



Digitized by the Internet Archive
in 2016

THE
ONTARIO REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (THE COURT OF APPEAL FOR
ONTARIO AND THE HIGH COURT OF
JUSTICE FOR ONTARIO).

3537

CITED [1946] O.R.

REPORTED UNDER THE AUTHORITY OF THE
LAW SOCIETY OF UPPER CANADA

EDITOR :
ALAN BURNSIDE HARVEY, K.C.,
B.C.L., M.A.

TORONTO 1:
THE CARSWELL COMPANY, LIMITED
145-149 Adelaide Street W.
TORONTO, CANADA.

Copyright (Canada), 1946, by The Law Society of Upper Canada.

THE LAW SOCIETY OF UPPER CANADA.
REPORTING COMMITTEE
1946-7.

W. J. BEATON, K.C., *Chairman*.

J. SHIRLEY DENISON, K.C., Treasurer, *ex officio*.

C. F. H. CARSON, K.C.

J. R. CARTWRIGHT, K.C.

HAMILTON CASSELS, K.C.

R. M. W. CHITTY, K.C.

W. B. COMMON, K.C.

F. J. HUGHES, K.C.

W. G. KERR, K.C.

J. R. MARSHALL, K.C.

H. J. McLAUGHLIN, K.C.

H. F. PARKINSON, K.C.

J. J. ROBINETTE, K.C.

JOSEPH SEDGWICK, K.C.

M. A. SEYMOUR, K.C.

GORDON N. SHAVER, K.C.

W. E. N. SINCLAIR, K.C.

A. G. SLAGHT, K.C.

G. T. WALSH, K.C.

P. D. WILSON, K.C.

TABLE OF CASES REPORTED.

A.	C.
Adams, Rex v. 506	Canada Trust Company, The, and Alliance Insur- ance Company, Re 298
Adams Estate and Crowe, Re 890	Cornwall, The Township of, v. McNairn et al. 837
Aikens et al., Western On- tario Natural Gas Com- pany Limited v. 661	Crone v. Crone and Kay 573
Alliance Insurance Company and The Canada Trust Company, Re 298	Crowe, Re Adams Estate and 890
Applebaum v. Gilchrist 695	D.
Appleton, McBride v. 17	Danluk v. Birkner et al. 427
Ashall, Rex v. 397	Dennison et al. v. Sanderson et al. 601
Attorney-General for Can- ada, Greenlees v. 90	Devine and Ferguson, Re ... 736
Attorney-General for On- tario, The, and The City of Toronto, Williams and Wilson Limited v. 309	F.
B.	Ferguson v. Lastewka et al. 577
Barnes, Rex v. 175	Ferguson, Re Devine and 736
B and F Theatres Limited, Brown et al. v. 454	Flavelle Estate, Re; National Trust Company, Limited et al. v. The Treasurer of Ontario 377
Bell, Re 854	Fleming & Talbot, Guaranty Trust Company of Can- ada v. 817
Bell and Bell, Kent v. 743	G.
Berthiaume et al. v. The City of Ottawa 788	Gemmell, Re 351
Birkner et al., Danluk v. 427	Gibbons, Rex v. 464
Booth et al. v. The City of St. Catharines et al. 628	Gilchrist, Applebaum v. 695
Bowers et al. v. J. Hollinger & Co. Limited et al. 526	Glens Falls Insurance Com- pany, Regal Films Cor- poration (1941) Limited v. 341
Brown v. Rotenberg et al. ... 363	Gordon, Rex v. 845
Brown et al. v. B and F Theatres Limited 454	Gray v. Yellowknife Gold Mines Limited and Bear Exploration and Radium Limited (No. 2) 639
Buckley and The Toronto Transportation Commis- sion v. Smith Transport Limited 798	

Greenlees v. Attorney-General for Canada	90
Gross, Rex v.	1
Guaranty Trust Company of Canada v. Fleming & Talbot	817

H.

Hamilton Street Railway Company et al., Marks v.	236
Harakas, Papadakis v.	67
Harris, Rex v.	407
Harwich, The Township of, v. The Township of Howard	268
Hilborn, Rex v.	552
Hollinger, J. & Co. Limited et al., Bowers et al. v.	526
Howard, The Township of, The Township of Harwich v.	268
Hunsinger v. The Town of Simcoe	203

I.

Incorporated Canadian Racing Associations, Re Ness and	387
Inter-City Forwarders Limited et al., W. R. Johnston and Company Limited et al. v.	754

J.

Johnston, W. R. and Company Limited et al. v. Inter-City Forwarders Limited et al.	754
---	-----

K.

Kent v. Bell and Bell	743
Kingston, The City of, Re Wilmot et al. and	437

L.

LaJeffries v. Roberts	10
Lake, Niles et al. v.	102
Lastewka et al., Ferguson v.	577
Lou Hay Hung, Rex v.	187

Mac, Mc.

McBride v. Appleton	17
McCart v. McCart and Adams	729
McInroy v. McInroy	587
McLellan Properties Limited v. Roberge and Roberge ...	379
McNairn et al., The Township of Cornwall v.	837

M.

Madill, Re Seperich and	864
Marks v. Hamilton Street Railway Company et al. ...	236
Mayosky, Rex v.	126
Mazerall, Rex v.	511, 762
Metcalfe, Re	882
Moore et al., Smallman v.	867
Morton, Re The Securities Act and	492
Mowder v. Roy	154

N.

Nathanson, Re	421
National Trust Company, Limited et al. v. The Treasurer of Ontario (Re Flavell Estate)	377
Ness and Incorporated Canadian Racing Associations, Re	387
Niles et al. v. Lake	102

O.

Olin v. Perrin et al.	54
Ottawa, The City of, Berthiaume et al. v.	788

P.

Papadakis v. Harakas	67
Perrin et al., Olin v.	54
Pfister v. Toronto Transportation Commission	328
Plant, Re	521
Porcupine Gold Reef Mining Company Limited, Re	145
Pszon, Re	229

R.

Regal Films Corporation (1941) Limited v. Glens Falls Insurance Company...	341
Religious Hospitallers of St. Joseph, The and The City of St. Catharines, Re	544
Rex v. Adams	506
Rex v. Ashall	397
Rex v. Barnes	175
Rex v. Gibbons	464
Rex v. Gordon	845
Rex v. Gross	1
Rex v. Harris	407
Rex v. Hilborn	552
Rex v. Lou Hay Hung	187
Rex v. Mayosky	126
Rex v. Mazerall	511, 762
Rex v. Thompson, Re	560
Rex v. Warner, Urquhart, Martin and Mullen	808
Roberge and Roberge, McLellan Properties Limited v.	379
Roberts, LaJeffries v.	10
Rodd et al. v. Western et al.	619
Rotenberg et al., Brown v. ...	363
Roy, Mowder v.	154

S.

St. Catharines, The City of, et al., Booth et al. v.	628
St. Catharines, The City of, Re The Religious Hospitallers of St. Joseph and.....	544

Sanderson et al., Dennison et al. v.	601
Scott v. Scott and Pfeil	832
Securities Act, The, and Morton, Re	492
Seperich and Madill, Re	864
Simcoe, The Town of, Hunsinger v.	203
Smallman v. Moore et al.	867
Smith Transport Limited, Buckley and The Toronto Transportation Commission, v.	798
Starr, Re	252
Strange et al., Wood v.	139
Streit v. Swanson et al.	565
Sutton and Sutton v. Vanderburg	497
Swanson et al., Streit v.	565

T.

Thompson, Re	77
Thompson, Re Rex v.	560
Tomlinson Construction Company Limited v. The City of Toronto	40
Toronto, The City of, v. The Governors of the University of Toronto et al.	215
Toronto, The City of, Tomlinson Construction Company Limited v.	40
Toronto, The City of, and the Attorney-General for Ontario, Williams and Wilson Limited v.	309
Toronto Transportation Commission, Pfister v.	328
Treasurer of Ontario, The, National Trust Company Limited, et al. v. (Re Flaville Estate)	377

U.

University of Toronto, The Governors of, et al., The City of Toronto v.	215
--	-----

V.		Williams and Wilson Limited v. The City of Toronto and the Attorney-General for Ontario	309
Vanderburg, Sutton and Sutton v.	497	Wilmot et al. and The City of Kingston, Re	437
W.		Wilton v. Wilton	117
Warner, Urquhart, Martin and Mullen, Rex v.	808	Wood v. Strange et al.	139
Western et al. Rodd et al. v.	619	Woods, Re	290
		Y.	
Western Ontario Natural Gas Company Limited v. Aikens et al.	661	Yellowknife Gold Mines Limited and Bear Exploration and Radium Limited, Gray v. (No. 2)	639

TABLE OF CASES CITED.

A.

NAME OF CASE.	WHERE REPORTED.	PAGE.
Abbott, Re	[1893] 1 Ch. 54	888
Aberdeen Ry. v. Blaikie Bros.	1 Macq. 461	657
Adam v. Ward	[1917] A.C. 309	602, 607, 608
Addie (Robt.) & Sons (Collieries) Ltd. v. Dumbreck	[1929] A.C. 358	633
Adel Muhammed El Dabbah v. Atty.- Gen. of Palestine	[1944] A.C. 156	467, 478
Aga Khan v. Times Publishing Co. ...	[1924] 1 K.B. 675	606
Aikens v. Kingston	53 O.L.R. 41	250
Akerele v. R.	[1943] A.C. 255	554
Akkersydck, Ex parte	[1892] 1 Q.B. 190	388
Aldborough and Dunwich, Re	4 O.W.R. 159	282
Aldrich v. Aldrich	24 O.R. 124	732, 733, 734, 735
Alexander v. C.N.R.	65 O.L.R. 162	162, 175
Allen v. C.P.R.	21 O.L.R. 416	755
Allen v. Flood	[1898] A.C. 1	690, 710, 715, 718
Allen v. Wedgwood	[1915] 1 Ch. 113	359
Alt. v. Stratheden and Campbell (Lord)	[1894] 3 Ch. 265	889
Aluminum Co. of Canada Ltd. v. To- ronto	[1944] O.R. 66; [1944] S.C.R. 267 42, 45, 51	42, 45, 51
Amand v. Home Secretary	[1943] A.C. 147	563, 564
American Aristotype Co. v. Eakins ..	7 O.L.R. 127	761
Anderson v. C.N.R.	[1944] O.R. 169	330, 338
Anderson v. Hunter	18 R. (Ct. of Sess.) 467	603, 604
Anderson Estate, Re	[1934] 1 W.W.R. 430	61
Andreas v. C.P.R.	37 S.C.R. 1	334, 458, 459
Andrews, Re	[1902] 2 Ch. 394	372
Andrews v. Director of Public Pro- secutions	[1937] A.C. 576	176, 553
Archer v. Sacred Heart Society	9 O.L.R. 474	751
Argles v. Pollock	12 O.W.N. 158	821
Arnold v. Stothers	1 O.W.N. 829	329
Aspden v. Seddon	L.R. 10 Ch. 394	258
Atherton, Re	[1912] 2 K.B. 251	518
Atlas Assur. Co. v. Brownell	29 S.C.R. 537	350
Atty.-Gen. v. Boulton	21 Gr. 598	326
Atty.-Gen. v. Esher Linoleum Co. ...	[1901] 2 Ch. 647	317
Atty.-Gen. v. Exeter	[1911] 1 K.B. 1092	620
Atty.-Gen. v. Goderich	5 Gr. 402	362
Atty.-Gen. v. Shrewsbury (Kings- land) Bridge Co.	21 Ch. D. 752	326
Atty.-Gen. v. Walker	3 Ex. 242	288
Atty.-Gen. for Alta. v. Cook	[1926] A.C. 444	120
Atty.-Gen. for Ont. v. Canadian Wholesale Grocers Assn.	53 O.L.R. 627	324
Atty.-Gen. for Ont. v. Russell	49 O.L.R. 103	90
Atwood v. Atwood	15 P.R. 425; 16 P.R. 50	56
Augustine Automatic Rotary Engine Co. v. Saturday Night Ltd.	38 O.L.R. 609	606
Australian Alliance Assur. Co. v. Atty.-Gen. of Queensland	[1916] St. R. Qd. 135	91

B.

Babcock v. Lawson	4 Q.B.D. 394	17
Bagshaw v. Bagshaw	48 O.L.R. 52	588

NAME OF CASE.	WHERE REPORTED.	PAGE.
Bailey v. Bailey	13 Q.B.D. 855	735
Bailey v. Victoria	60 S.C.R. 38	317, 828, 842, 844
Bainbridge v. Smith	41 Ch. D. 462	572
Baird v. Wells	44 Ch. D. 661	389
Baker v. Bethnal Green	[1945] 1 All E.R. 135	633
Baker v. Dumaresq	[1934] S.C.R. 665	827
Baker v. Smith	Sty. 295	878
Baldwin v. O'Brien	40 O.L.R. 24	204, 205
Bank of Montreal v. Stuart	[1911] A.C. 120	380, 381
Bank of Toronto v. Quebec Fire Ins. Co.	18 P.R. 41	819, 821
Banky v. Belleville	[1941] O.W.N. 11	790
Banks v. Goodfellow	L.R. 5 Q.B. 549	804
Bannister v. Thompson	29 O.L.R. 562; 32 O.L.R. 34	173, 698, 718, 720
Barford v. Street	16 Ves. 135	296
Barker, Re	25 T.L.R. 753	352
Barks v. Done	[1933] O.R. 784; [1933] O.W.N. 822	695, 716, 727
Barling v. Bishopp	29 Beav. 417	581
Bartholomew v. Menzies	[1902] 1 Ch. 680	365, 372
Bass v. Hendon	28 T.L.R. 317	744
Bassel's Lunch Ltd. v. Kick	[1936] O.R. 445	730, 828
Bates v. Donaldson	[1896] 2 Q.B. 241	11
Batt v. Beaverton	52 O.L.R. 159	204, 208
Bay-Front Garage Ltd. v. Evers	[1944] S.C.R. 20	329
Bayley v. Trusts & Guarantee Co.	66 O.L.R. 254	375, 376, 870
Beam v. Beatty	4 O.L.R. 554	18, 20, 21, 30, 32
Beardmore, Re	[1935] O.R. 526	796
Beattie v. Beattie	[1945] O.R. 129	862
Beatty v. Bailey	26 O.L.R. 145	621
Beatty v. Neelon	12 O.A.R. 50; 13 S.C.R. 1	674
Beaty v. Hackett	14 P.R. 395	304
Beaumont, Re	[1902] 1 Ch. 889	372, 374
Beaumont v. Ewbank	[1902] 1 Ch. 889	372, 374
Becker v. Toronto	[1933] O.R. 843	218, 219
Beckerton v. C.P.R.	6 O.W.N. 158; 7 O.W.N. 51	329
Beckett v. G.T.R.	13 O.A.R. 174	161
Bedford (Duke) v. Ellis	[1901] A.C. 1	325
Beer v. Lea	29 O.L.R. 255	380
Bell v. Kennedy	L.R. 1 H.L. Sc. 307	120, 125
Bell Telephone Co. v. R. and Rozon.	62 Que. K.B. 559	398
Belyea v. R.	[1932] S.C.R. 279	2, 7
Benjamin, Re	[1902] 1 Ch. 723	859
Benson, Re	[1937] O.W.N. 1	229
Beresford v. Royal Ins. Co.	[1938] A.C. 586	432
Bewdley Election Petition, Re	19 L.T. 676	1
Bien and Cooke, Re	[1944] 1 W.W.R. 237	92
Big Point Club v. Lozon	[1943] O.R. 491	323
Birkett v. C.P.R.	65 O.L.R. 477	249, 251
Bitter v. Secretary of State	[1944] Ex. C.R. 61	306
Blaiberg v. De Andia Yrarrazaval	[1940] Ch. 385	263, 264
Blainey (W. J.) Ltd. and Toronto, Re	[1935] O.R. 476	546
Blais v. Sturgeon Falls	[1939] O.W.N. 370	792
Blake's Case	2 M. & S. 428	88
Blake v. Lanyon	6 Term. Rep. 221	709
Blakey v. Latham	43 Ch. D. 23	730, 732
Bleakley v. Prescott	12 O.A.R. 637	790
Blue & Deschamps v. Red Mountain Ry.	[1909] A.C. 361	161
Board of Education v. Rice	[1911] A.C. 179	394
Bonnell v. Smith	6 O.W.N. 414	868

NAME OF CASE.	WHERE REPORTED.	PAGE.
Bonanza Creek Hydraulic Concession v. R.	40 S.C.R. 281	388
Borchert v. Ranger, Tex.	42 Fed. Supp. 577	93
Borwick, Re	[1933] Ch. 657	263, 264
Borwick v. Southwark	[1909] 1 K.B. 78	218
Bottomley v. Bannister	[1932] 1 K.B. 458	744
Boulton's Settlement Trust, Re	[1928] Ch. 703	384
Bowden v. Fort Smith	316 U.S. 584	93
Bowen, Re	[1893] 2 Ch. 491	889
Bowie or Ramsay v. Liverpool Royal Infirmary	[1930] A.C. 588	120
Bozson v. Altrincham	[1903] 1 K.B. 547	730, 826, 828
Bradbury v. Grimble & Co.	[1920] 2 Ch. 548	739
Bradford v. Belfield	2 Sim. 264	384
Branch Lines, Re (C.P.R. v. James Bay Ry.)	36 S.C.R. 42	625, 626
Bray v. Ford	[1896] A.C. 44	616
Brenner v. Toronto Ry.	15 O.L.R. 195; 40 S.C.R. 540	161
Brindley v. Woodhouse	1 Car. & K. 647	316
B. C. Electric Ry. v. Loach	[1916] 1 A.C. 719	237
B. C. Fir & Cedar Lumber Co. v. R.	[1931] S.C.R. 435	308
Brockville v. Dobbie and Ritchie	64 O.L.R. 75	69
Brockville v. Paramount Theatres Ltd.	64 O.L.R. 75	69
Bromley v. Wallace	4 Esp. 237	166
Bronson v. Evans	[1943] O.R. 248	157
Brooks v. R.	[1927] S.C.R. 633	412, 767
Brooks-Bidlake & Whittall Ltd. v. Atty.-Gen. for B.C.	[1923] A.C. 450	352
Broome v. Agar	44 T.L.R. 339	607
Brown v. Croome	2 Stark. 297	602, 603
Brown v. Walsh	45 O.L.R. 646	33
Brown and Brock and Rentals Administrator, Re	[1945] 3 D.L.R. 324	387, 390
Browning v. Masson, Ltd.	52 S.C.R. 379	760
Bruce v. Leisk	19 R. (Ct. of Sess.) 482	604
Burce, Re	17 Sask. L.R. 463	303
Burland v. Earle	[1902] A.C. 83	674
Burns v. Burns and Fredericks	[1944] O.R. 561	588, 590, 595, 596, 597, 599
Butt v. Gt. Western Ry.	11 C.B. 140	755, 757
Butt v. Oshawa	59 O.L.R. 520	170
Butterworth v. Butterworth	[1920] P. 126	158, 164, 171, 172, 173, 699
Buxton v. Lister	3 Atk. 383	380

C.

C. C. Motor Sales Ltd. v. Chan	[1926] S.C.R. 485	23
Cadogan v. Kennett	2 Cowp. 432	580, 581
Cain v. Moon	[1896] 2 Q.B. 283	368
Cairney v. Back	[1906] 2 K.B. 746	304
Campbell v. Campbell	25 U.C.C.P. 368	713
Campbell River Mills Ltd., Re	44 B.C.R. 412	307
Campbell v. Spottiswoode	3 B. & S. 769	602, 603
C.N.R. v. Capreol	[1925] S.C.R. 499	217
C.N.R. v. Clark	[1923] S.C.R. 730	247
C.N.R. v. LePage (Lesage)	[1927] S.C.R. 575	336, 429, 457, 458, 461
C.N.R. v. Prescesky	[1924] S.C.R. 2	237, 247, 250
C.P.R. v. James Bay Ry.	36 S.C.R. 42	625, 626
C.P.R. v. Smith	62 S.C.R. 134	237, 246, 247
Canadian Westinghouse v. Murray Shoe Co.	31 O.L.R. 11	24
Canning's Will Trusts, Re	[1936] Ch. 309	888

NAME OF CASE.	WHERE REPORTED.	PAGE.
Capel v. Powell	17 C.B.N.S. 743	700, 713
Capital Coach Lines Ltd. v. Hagan..	[1945] O.W.N. 684	380
Carey, Re	[1940] O.R. 171	56, 63
Carmichael, Ex parte	[1928] 1 K.B. 291	388
Carrol v. Plympton	9 U.C.C.P. 345	744
Cashin v. Cashin	[1938] 1 All E.R. 536	103, 106
Cassidy, Re	33 O.W.N. 191	893
Cassidy v. Daily Mirror News- papers Ltd.	[1929] 2 K.B. 331	603
Cavalier v. Pope	[1906] A.C. 428	339, 744
Cavanagh, Re	[1938] O.W.N. 67	890, 893
Chafer and Randall's Contract, Re..	[1916] 2 Ch. 8	866
Chamberlain v. Williamson	2 M. & S. 408	878, 880
Chamberlayne v. Brockett	L.R. 8 Ch. 206	888
Chambers v. Caulfield	6 East 244	174
Champney v. Davy	11 Ch. D. 949	360
Chaplin v. Ellesmere	[1932] 2 K.B. 431	602, 609
Chatham v. Sisters of St. Joseph ..	[1940] O.W.N. 548	437, 439, 448
Chaytor, In re; Chaytor v. Horn ...	[1905] 1 Ch. 233	426
Chichester Diocesan Fund v. Simp- son	[1944] A.C. 341	885
Chinook v. Hartley Wintney Coun- cil	63 J.P. 327	311
Chorley, Ex parte	[1933] 2 K.B. 696	395
Christie v. Edwards	[1939] O.R. 48; [1940] O.R. 28; [1940] S.C.R. 410	153
Churchward v. Churchward	[1895] P. 7	834, 835
Ciaralli v. T.T.C.	[1933] O.W.N. 358	251
Clark v. Dockstader	36 S.C.R. 622	626
Clark v. R.	61 S.C.R. 608	467, 469, 487, 489
Clavering v. Ellison	7 H.L. Cas. 707	253, 263, 266
Clayton v. Ramsden	[1943] A.C. 320	254, 263, 265, 266
Clements v. L. & N. W. Ry.	[1894] 2 Q.B. 482	22, 27, 29, 36
Clifford and O'Sullivan, Re	[1921] 2 A.C. 570	389, 561
Coan v. Bowles	Carth. 122	31
Coburn v. Saskatoon	[1935] 1 W.W.R. 392	430, 431
Coke (Cooke) v. Sayer	2 Wils. 85	164
Colburn v. Patmore	1 Cr. M. & R. 73	436
Coleman, Re	[1936] Ch. 528	888
Collins v. Public Trustee	[1927] N.Z.L.R. 746	55
Collison v. Warren	[1901] 1 Ch. 812	500
Collom v. McGrath	15 Man. R. 96	18
Combes's Case	9 Co. Rep. 75a	384
Comfort v. Brown	10 Ch. D. 146	293
Comiskey v. Bowring-Hanbury	[1905] A.C. 84	258
Commercial Union Assur. Co. v. Margeson and Miller	29 S.C.R. 601	350
Commonwealth Trust Ltd. v. Ako- tey	[1926] A.C. 72	39
Connor v. Cornell	57 O.L.R. 35	429
Constable v. Bull	3 DeG. & Sm. 411	521
Cooke v. Brogden & Co.	1 T.L.R. 497	616
Cooper v. Simmons	7 H. & N. 707	28
Cooper v. Stuart	14 App. Cas. 286	70, 73
Cooper v. Walker	2 B. & S. 770	844
Corn v. Matthews	[1893] 1 Q.B. 310	28, 29, 35
Cornish v. Boles	31 O.L.R. 505	11, 14
Cosnahan v. Grice	15 Moo. P.C. 215	364
Cotton v. Wood	8 C.B.N.S. 568	245
Cousen v. Cousen	4 Sw. & Tr. 164	588
Cowern v. Nield	[1912] 2 K.B. 419	27
Cowper v. Laidler	[1903] 2 Ch. 337	503
Cox v. English, Scottish & Austral- ian Bank Ltd.	[1905] A.C. 168	157
Cox v. Muncey	6 C.B.N.S. 375	31

NAME OF CASE.	WHERE REPORTED.	PAGE.
Crippen, Re	[1911] P. 108	432
Crothers, Re	22 O.W.N. 400	425
Crusoe d. Blencowe v. Bugby	2 Wm. Bl. 766	11, 15
Cunningham, Ex parte	13 Q.B.D. 418	122
Curran, Re	[1939] O.W.N. 191	252
Currey, Re	32 Ch. D. 361	292
Cusack v. Day	36 B.C.R. 106	365
Cuthbert v. Commercial Travellers' Assn.	39 U.C.Q.B. 578	397
Cutter, Re	37 O.L.R. 42	521, 524

D.

D. v. B.	40 O.L.R. 112	871
Dagnall, Re	[1896] 2 Q.B. 407	230
Daimler Co. v. Continental Tyre & Rubber Co.	[1916] 2 A.C. 307	684
Dalziel, Re	[1943] Ch. 277	889
Daly v. Brown	39 S.C.R. 122	105
Darling v. Sun Life Assur. Co.	[1943] O.R. 26	858, 862
Darlow v. Sparks	[1938] 2 All E.R. 235	365
Darnell v. Darnell	[1945] O.R. 743	575, 576
Davidson (Charles R.) & Co. v. M'Robb or Officer	[1918] A.C. 304	530, 531, 533
Davies v. Snead	L.R. 5 Q.B. 608	603
Davies v. Solomon	L.R. 7 Q.B. 112	713
Davis v. Foots	[1940] 1 K.B. 116	744
Davy v. Myers	Taylor 89	869, 870, 879
Dawson v. Sawatzky	[1946] 1 W.W.R. 33	540
Debtor, Re	[1927] 1 Ch. 97	234
Decker v. Bracebridge Garage	[1944] O.R. 16	432
De Francesco v. Barnum	45 Ch. D. 430	28, 35
Degg v. Midland Ry.	1 H. & N. 773	744
Delaney v. R.	[1941] 3 D.L.R. 217	329
Delgoffe v. Fader	[1939] Ch. 922	365, 367, 368, 370, 372, 373
Dent v. Central Canada Exhibition Assn.	[1935] O.W.N. 419	329
Desrochers v. R.	69 C.C.C. 322	768
Dillon, Re	44 Ch. D. 76	372, 373
Dillon v. Public Trustee of N.Z.	[1941] A.C. 294	55, 59
Dinning v. Ingham	44 B.C.R. 412	307
Dinning v. Workmen's Compensation Board	[1932] 1 W.W.R. 136	307
Director of Public Prosecutions v. Beard	[1920] A.C. 479	409
Doan v. Neff	38 O.L.R. 216	161
Doe d. Barker v. Crosby	7 U.C.Q.B. 202	70
Doe d. Pitt v. Hogg	4 Dow. & Ry. K.B. 226	11
Doe Wheeler v. McWilliams	2 U.C.Q.B. 77	863
Donaghy v. Brennan	19 N.Z.L.R. 289	799
Donn v. Moses	[1944] Ch. 8	264, 266
Douglas, Re	35 Ch. D. 472	353
Dovey v. Cory	[1901] A.C. 477	682, 687
Doyle v. White City Stadium Ltd.	[1935] 1 K.B. 110	27, 29
Duberley v. Gunning	4 Term Rep. 651	166
Dublin, Wicklow & Wexford Ry. v. Slattery	3 App. Cas. 1155	247
Dubrofsky and Viger Co., Re	15 C.B.R. 230	229, 230
Duchess of Kingston's Case	2 Sm. L.C., 9th ed., 812	402
Duckworth v. Lee	[1899] 1 I.R. 405	365, 373
Duffield v. Elwes	1 Bli. N.S. 497	366
Duffin v. Duffin	44 Ch. D. 76	372
Duncombe v. Daniell	8 C. & P. 222	602, 604, 606
Dundas St. Bridges, Re	8 O.L.R. 52	287

NAME OF CASE.	WHERE REPORTED.	PAGE.
Durham & Sunderland Ry. v. Walker	2 Q.B. 940	74
Dyer v. Dyer	2 W. & T.L.C. Eq. (9th ed.)	749 103
Dyson v. Atty.-Gen.	[1911] 1 K.B. 410	90, 91, 96, 326

E.

Eades, Re	[1920] 2 Ch. 353	884
Earnshaw v. Dominion of Canada General Ins. Co.	[1943] O.R. 385	156
Eastern Counties, etc., Ry. v. Marriage . . .	9 H.L. Cas. 32	283
Eberts v. R.	47 S.C.R. 273	407
Economical Mutual Fire Ins. Co. v. Berlin	20 O.W.R. 349	43
Edmunds v. Edmunds	[1904] P. 362	581, 585
Edwards v. North Bay	8 O.W.N. 119	788
Edwards v. Porter	[1925] A.C. 1	701, 714
Edwards v. Wingham Agricultural Implement Co.	[1913] 3 K.B. 596	533
Edwards (W. C.) & Co. and Ottawa, Re	26 O.W.N. 320	217
Eggar v. May	[1932] 1 Ch. 99	252, 253
Elgin v. Stubbs	62 O.L.R. 128	868
Elkowech v. Elkowech	16 Alta. L.R. 519	158
Elliott v. Albert	[1934] 1 K.B. 650	715
Ellis v. Fulham Borough Council ..	[1938] 1 K.B. 212	632, 633
Embree v. Millar	11 Alta. L.R. 127	148
Engel v. T.T.C.	59 O.L.R. 514	249
English & Scottish Co-operative, etc., Society v. Odham's Press Ltd.	56 T.L.R. 195	605
Entertainment Protection Assn., Ex parte	[1931] 2 K.B. 215	388, 390, 395
Ernest v. Nicholls	6 H.L. Cas. 401	657
Errington v. Metropolitan Dist. Ry.	19 Ch. D. 559	288
Errington v. Minister of Health	[1935] 1 K.B. 249	394
Essery v. Court Pride	2 O.R. 596	389
Euphemia v. Brooke	1 C. & S. 358	270
Evangelical Lutheran Synod v. Edmonton	[1934] S.C.R. 280	217
Evans v. Evans	1 Hag. Con. 35	588
Evans v. Rival Granite Quarries Ltd.	[1910] 2 K.B. 979	304
Evans v. Ware	[1892] 3 Ch. 502	27
Ewer v. Ewer	36 T.L.R. 517	171
Exmouth v. Praed	23 Ch. D. 158	254

F.

Fairholme v. Firth & Brown Ltd. ..	49 T.L.R. 470	541
Fairman v. Perpetual Investment Bldg. Society	[1923] A.C. 74	338, 339, 429, 430, 632
Falsetto v. Brown	[1933] O.R. 645	244
Falvey v. Stanford	L.R. 10 Q.B. 54	605
Farber v. T.T.C.	56 O.L.R. 537	250
Fellows v. Wood	59 L.T. 513	27
Ferguson v. Kansas City Public Service Co.	156 Pac. (2d) 869	330
Fermenia, Ex parte	[1892] 1 Q.B. 190	388
Ferrand v. Milligan	7 Q.B. 730	311
Fine v. T.T.C.	[1945] O.W.N. 901	537, 540
Fingland v. Brown and Garon	[1943] O.R. 13	161
Finlay v. Chirney	20 Q.B.D. 494	869, 877, 878, 879

NAME OF CASE.	WHERE REPORTED.	PAGE.
First Nat. Bank of Bode, Idaho v. Williams	31 Fed. (2d) 749	229
Fisher v. Prowse	2 B. & S. 770	844
Flavelle Estate, Re	[1943] O.R. 167	378
Fletcher's Estate, Re	26 O.R. 499	381
Flint v. Courthope	87 L.J.K.B. 504	94
Flower v. L. & N.W. Ry.	[1894] 2 Q.B. 65	29, 35
Fogan, Ex parte	46 N.B.R. 370	79
Fogg v. Kenora	[1940] O.R. 421	790, 791
Folkestone v. Brockman	[1914] A.C. 338	203
Follett v. McCormick	321 U.S. 573	92
Follick v. Wabash R.R. Co.	45 O.L.R. 528; 60 S.C.R. 375	243
Follis v. Albemarle	[1941] O.R. 1	11
Fozard v. Fozard	[1924] C.P.D. 62	123
Freeman, Re	[1910] 1 Ch. 681	253
Fullerton v. Crawford	59 S.C.R. 314	659
Fulton v. Creelman	[1931] S.C.R. 221	207
Furnishers Ltd. v. Booth	[1933] 1 D.L.R. 54	69

G.

Gach v. R.	[1943] S.C.R. 250	408, 764
Gallant v. Mellett	18 C.L.T. (Occ. N.) 199	17
Gandy v. Gandy	7 P.D. 168	64
Gardner v. Parker	3 Madd. 184	374
Garland v. Clarkson	9 O.L.R. 281	820, 831
Garnett v. Willan	5 B. & Ald. 53	755
Gauley v. C.P.R.	65 O.L.R. 477	249, 251
Gay, Re	59 O.L.R. 40	733, 734
Gaynor and Greene, Re	9 C.C.C. 205	79
General Fireproofing Co., Re	[1936] O.R. 225; 510; [1937] S.C.R. 150	305
Gerow, Ex parte	10 N.B.R. 512	364
Gibbon v. Phillips	64 L.J.M.C. 42	284, 286
Gibson v. McDougall	17 O.W.N. 157	608
Gibson v. Way	32 Ch. D. 361	292
Gillard v. Cuthbert	9 O.W.R. 77	585
Gillard v. McKinnon	9 O.W.R. 77	585
Ginsberg, Re	40 O.L.R. 136	780
Glenroy, M. v., Part Cargo	[1945] A.C. 124	685
Godfrey, Ex parte	29 L.J. Ch. 543	354
Godson and Toronto, Re	16 O.A.R. 452	389
Goldie v. Bank of Hamilton	27 O.A.R. 619	303
Goodeve v. Manners	5 Gr. 114	360
Goodeve v. White	15 P.R. 433	823
Gordon v. Jones	14 Fort L.J. 36	380
Gough v. Toronto & York Radial Ry.	42 O.L.R. 415	819, 820
Goyan v. Kinash	[1945] 1 W.W.R. 291	581
Graham v. Saville	[1945] O.R. 301	170
G.T.P. Ry. v. Dearborn	58 S.C.R. 315	620
G.T.R. v. Griffith	45 S.C.R. 380	237, 245, 251
G.T.R. v. Hainer	36 S.C.R. 180	248
G.T.R. v. Robinson	[1915] A.C. 740	755, 758
Grant v. Cornock	16 O.A.R. 532	868
Gray v. Gee	39 T.L.R. 429	697, 714, 715, 723
Gray v. Yellowknife Gold Mines Ltd. (No. 1)	[1945] O.R. 688	659
Great Lakes SS. Co. v. Maple Leaf Milling Co.	54 O.L.R. 174, 41 T.L.R. 21	752
Greaves v. Cadieux	50 Que. S.C. 361	18
Green v. Thompson	[1899] 2 Q.B. 1	29
Green v. Whitehead	[1930] 1 Ch. 38	384
Green and Breckenridge v. C.N.R.	[1932] S.C.R. 689	458
Greet v. Citizens' Ins. Co.	27 Gr. 121; 5 O.A.R. 596	303

NAME OF CASE.	WHERE REPORTED.	PAGE.
Gregson v. Henderson Roller Bearing Co.	20 O.L.R. 584	744
Greisman v. Gillingham	[1934] S.C.R. 375	330, 340
Grey v. Cooper	3 Doug. K.B. 65	23
Grey v. Pearson	6 H.L. Cas. 61	266
Griffith v. Thompson	44 W.R. 582	254
Grossman v. Modern Theatres Ltd.	45 O.L.R. 564	11, 15
Grove v. Portal	[1902] 1 Ch. 727	15
Grove-Grady, Re	[1929] 1 Ch. 557	353
Guaranty Trust Co. v. Hannay & Co.	[1915] 2 K.B. 536	91
Guelph v. Canada Co.	4 Gr. 632	325, 837
Gurofski v. Harris	27 O.R. 201; 23 O.A.R. 717 ..	581, 585

H.

H. v. H.	[1944] O.R. 438	56
Halbert v. Netherlands Investment Co.	[1945] S.C.R. 329	827
Hale v. Metropolitan Saloon Omnibus Co.	28 L.J. Ch. 777	581
Halifax Commercial Banking Co. and Wood, Re	79 L.T. 183; 536	317
Hall v. Hall	20 O.R. 684	364, 365
Hamilton v. Barton	20 S.C.R. 173	270
Hamilton v. Morrison	18 U.C.C.P. 228	362
Hansell v. Spink	[1943] Ch. 396	859
Harcourt v. Solloway Mills & Co.	40 O.W.N. 214	158
Harman v. Richards	10 Hare 81	580
Harman and Uxbridge & Rickmansworth Ry.	24 Ch. D. 720	866
Harper v. Prescott	[1939] O.W.N. 492; [1940] S.C.R. 688	789, 792, 793
Harris v. Mudie	7 O.A.R. 414	311
Harris v. Whitehead	25 Man. R. 105	17
Harrison, Re	10 Morr. 1	230
Harrison v. Bush	5 E. & B. 344	609
Harrison v. Guest	6 DeG. M. & G. 424	677
Harrison v. Toronto Motor Car Ltd.	[1945] O.R. 1	626
Hastings v. St. Catharines	43 U.C.Q.B. 134	319, 320
Hawley v. Hand	50 O.L.R. 444	581, 868
Hawn v. Hawn	[1944] 4 D.L.R. 173	56
Haynes v. Harwood	[1935] 1 K.B. 146	635
Haynes-Smith, Ex parte	[1928] 1 K.B. 411	393
Hayward v. Drury Lane Theatre Ltd.	[1917] 2 K.B. 899	744
Head-Patrick v. Patrick	15 Sask. L.R. 304	735
Heasmer v. Pickfords Ltd.	36 T.L.R. 818	744
Hebditch v. MacIlwaine	[1894] 2 Q.B. 54	603
Heddon v. Evans	35 T.L.R. 642	79
Hedge v. Morrow	32 O.L.R. 218	858, 862
Hegarty v. Shine	14 Cox C.C. 124	429, 430
Heller v. Niagara Racing Assn.	56 O.L.R. 355	389
Hellwig v. Mitchell	[1910] 1 K.B. 609	869
Henderson v. Strang	60 S.C.R. 201	659
Henderson & Co. v. Williams	[1895] 1 Q.B. 521	17, 39
Hendrickson v. Kallio	[1932] O.R. 675	730, 731, 818, 822, 827, 828
Hickerson v. Parrington	18 O.A.R. 635	580, 581
Highley v. C.P.R.	64 O.L.R. 615	237
Hillen v. I.C.I. (Alkali) Ltd.	[1934] 1 K.B. 455	429, 430, 433
Hipwell, Re	[1945] 2 All E.R. 476	886
Hipwell v. Hewitt	[1945] 2 All E.R. 476	886
Hitch v. Leworthy	2 Hare 200	384
Hobbs v. Nottingham Journal Ltd.	[1929] 2 K.B. 1	606

NAME OF CASE.	WHERE REPORTED.	PAGE.
Hobbs v. Tinling, (C.T.) & Co.	[1929] 2 K.B. 1	606
Hodge's Case	2 Lew C.C. 227	411
Hodgins v. Hodgins	[1942] O.R. 440	834
Hodgson, Re	50 O.L.R. 531	114
Hodgson v. Ambrose	1 Dougl. K.B. 337	258, 260
Hodgson v. DeBeauchesne	12 Moo. P.C. 285	122
Hodgson v. Halford	11 Ch. D. 959	252
Holland v. Toronto	[1927] S.C.R. 242	790, 791, 792
Holmes v. Director of Public Prosecutions	[1946] 2 All E.R. 124	706
Holywell Union v. Halkyn District Mines, etc., Co.	[1895] A.C. 117	218, 222
Hood v. Caldwell	[1923] S.C.R. 488	676
Hooper, Re	7 O.W.N. 104	297
Hope v. Freeman	[1910] 1 Ch. 681	253
Hopkinson v. Westerman	45 O.L.R. 208	581
Horne v. Horne	2 Sw. & Tr. 48	704
Hornell, Re	[1945] O.R. 58	258
Howe v. Howe	[1937] O.R. 57	733
Hubin v. R.	[1927] S.C.R. 442	868
Hull Estate, Re	[1943] O.R. 778	54, 55
Hunter v. Atty.-Gen. and Hood	[1899] A.C. 309	325
Hunter v. Boyd	3 O.L.R. 183	881
Hunter and Toronto, Re	8 O.L.R. 52	287
Huntley v. March	14 O.W.R. 1033	275
Hurst v. Picture Theatres Ltd.	[1915] 1 K.B. 1	388, 389
Huson and South Norwich, Re	19 O.A.R. 343; 21 S.C.R. 669	270
Huycke v. Cobourg	[1937] O.R. 682	789, 790, 792, 793
Hyatt v. Allen	26 O.W.R. 215	682
Hydro-Electric Power Comm. and Thorold and Pelham, Re	55 O.L.R. 431	216
Hyman v. Hyman	[1929] A.C. 601	56

I.

Ibrahim v. R.	[1914] A.C. 599	479, 779
Illidge v. Goodwin	5 C. & P. 190	632
Imperial Gas, Light & Coke Co. v. Broadbent	7 H.L. Cas. 612	503
Ince v. Toronto	27 O.A.R. 410; 31 S.C.R. 323	790
Income Tax Commrs. v. Pemsel	[1891] A.C. 531	218, 227, 353, 620
Indermaur v. Dames	L.R. 1 C.P. 274; L.R. 2 C.P. 311	329, 335, 338, 339, 429, 431, 435, 458, 459, 463, 752, 753
Inman, Re Inman v. Inman	[1915] 1 Ch. 187	425
International Accountants Society Inc. v. Montgomery	[1935] O.W.N. 364	18
International Metal Industries Ltd. and Toronto, Re	[1940] O.R. 271	44, 218
Isaacs & Sons v. Salbstein	[1916] 2 K.B. 139	826
Ivan v. Hartley	[1945] O.W.N. 627	17, 21, 30
Ivett v. Ivett	143 L.T. 680	855, 862

J.

Jackson v. Normanby Brick Co.	[1899] 1 Ch. 438	504
Jackson v. Simons	[1923] 1 Ch. 373	12
Jalbert v. R.	[1936] Ex. C.R. 127; [1937] S.C.R. 51	311
James, Re	13 C.B.R. 247	230
Jenkins v. Morris	14 Ch. D. 674	161
Jenoure v. Delmege	[1891] A.C. 73	606
Jewell v. G.T.R.	55 O.L.R. 617	237, 248
Jobin v. Arizona	316 U.S. 584	93
Jocelyn, Ex parte	7 N.B.R. 637	394
Johnson, Re	27 O.L.R. 472	524

NAME OF CASE.	WHERE REPORTED.	PAGE.
Johnston v. McIntosh	3 C.L.T. 313	820
Jones v. E. Hulton & Co.	[1909] 2 K.B. 444	616
Jones v. Opelika	316 U.S. 584	93
Jordan v. Limmer & Trinidad Lake Asphalt Co.	[1946] 1 All E.R. 527	541
Joseph v. Phillips	[1934] A.C. 348	370, 372, 374
Just v. Stewart	23 Man. R. 517	216

K.

Keane v. Boycott	2 Hy. Bl. 511	28, 31, 38
Keach v. Sandwich, Windsor & Amherstburg Ry.	8 O.W.N. 96	329
Kemerer v. Standard Stock & Mining Exchange	32 O.W.N. 295	397
Kendrick v. Dominion Bank	48 O.L.R. 539	365, 374
Kennedy v. Kennedy	[1907] P. 49	56
Kennedy v. Minister of National Revenue	[1929] Ex. C.R. 36	217
Kester v. Hamilton	[1937] O.R. 420	339
Keyse v. Keyse	11 P.D. 100	169, 172
Kielb v. C.N.R.	[1941] O.W.N. 286	238
King, Re	[1940] O.W.N. 57	525
King, The see "R."		
King and Marylake Agricultural Assn., Re	[1939] O.R. 13	218
Kingston v. Drennan	27 S.C.R. 46	790, 791, 792
Kipps v. Lane	86 L.J.K.B. 735	93
Kirkham and R., Re	[1930] 2 W.W.R. 10	399, 401
Klix v. St. Stanislaus Parish	118 S.W. 1171	92
Knight v. G.T.P. Dev. Co.	[1926] S.C.R. 674	431
Knowlton v. Hydro-Electric Power Commn.	58 O.L.R. 80	458
Kovinsky v. Kovinsky	29 O.W.N. 179	540

L.

Laidler v. Laidler	36 T.L.R. 510	836
Lal Chand Marwari v. Mahant Ramrup Gir	42 T.L.R. 159	855, 862
Lamontagne v. R.	48 Que. K.B. 474	188
Lang v. Willis	52 C.L.R. 637	602
Langley v. Kahnert	9 O.L.R. 164	18
Laporte v. C.P.R.	[1924] S.C.R. 278	160
Lauderdale Peerage, The	10 App. Cas. 692	120, 122
Launceston Election Petition, Re ..	30 L.T. 823	1, 9
Lawry v. Tuckett-Lawry	2 O.L.R. 162	696, 716
Leavens v. Great West Permanent Loan Co.	36 Man. R. 606	572
Leeds & Batley Breweries, Ltd. and Bradbury's Lease, Re ..	[1920] 2 Ch. 548	739
Leeson v. Havelock	[1940] O.R. 331; [1940] 4 D.L.R. 791	792, 793
Lellis v. Lambert	24 O.A.R. 653	695, 696, 697, 698, 699, 702, 703, 704, 716, 717, 718, 719, 720, 725, 727, 728
Leonard v. Burrows	7 O.L.R. 316	730, 732
L'Estrange v. F. Graucob Ltd.	[1934] 2 K.B. 394	103
Letang v. Ottawa Electric Ry.	[1926] A.C. 725	250, 330
Levi v. Milne	4 Bing. 195	602, 604
Lewis v. Harris	24 Cox C.C. 66	408
Lewis (J.) & Sons Ltd. v. Dawson ..	[1934] S.C.R. 676	258
Linton v. Linton	15 Q.B.D. 239	735
Littley v. Brooks and C.N.R.	[1930] S.C.R. 416	244
Liverpool v. Chorley Union Assessment Committee	[1911] 1 K.B. 1057; [1912] 1 K.B. 271	222

NAME OF CASE.	WHERE REPORTED.	PAGE.
Lloyd Phillips v. Davis	[1893] 2 Ch. 491	889
Local Government Board v. Ar- lidge	[1915] A.C. 120	394
Lockhart v. Harrison	139 L.T. 521	602, 607, 609
Loeb v. Columbia Trustees	179 U.S. 472	352
London Chartered Bank of Aus- tralia v. Lemprière	L.R. 4 P.C. 572	295
London Electricity Joint Commit- tee Co., Ex parte	[1924] 1 K.B. 171	388, 393, 395
London Life Ins. Co. v. Lang Shirt Co.	[1929] S.C.R. 117	858
London & South Western Ry. v. Gomm	20 Ch. D. 562	741
Loranger v. Haines	50 O.L.R. 268	677
Lorne Park, Re	30 O.L.R. 289	841
Lovell v. Lovell	13 O.L.R. 569	588, 590, 596, 597
Lowry v. Thompson	29 O.L.R. 478	863
Lucas-Tooth v. Lucas-Tooth	[1921] 1 A.C. 594	258, 260
Ludgate v. Ottawa	8 O.W.R. 257	791
Lumley v. Gye	2 E. & B. 216	699, 711, 718
Lynch v. Knight	9 H.L. Cas. 577	697, 699, 700, 704, 713, 722, 723, 724
Lynch v. Muskogee	47 Fed. Supp. 589	93
Lynch v. Nurdin	1 Q.B. 29	632

Mac, Mc.

McCallum, Hill & Co. v. Imperial Bank	7 Sask. L.R. 333	11
McCannell v. McLean	[1937] S.C.R. 341	160, 168, 176
McDill v. Hilson	30 Man. R. 454	18
Macdonald v. Norwich Union Ins. Co.	10 P.R. 462	820, 831
McDonald v. Mulqueen	53 O.L.R. 191	608, 869
McDonald Estate, Re	35 N.S.R. 500	524
McDougal v. Harwich	[1945] O.R. 291	270
McEvoy v. Belfast Banking Co.	[1935] A.C. 24	105
Macfadzen v. Olivant	6 East 387	164
McGaw v. Fisk	38 N.B.R. 354	18
McGonnell v. Murray	3 Ir. Eq. 460	364
McGregor v. Curry	31 O.L.R. 261; 25 D.L.R. 771	870
McGuire (W. J.) Co. v. Bridger	49 S.C.R. 632	752
McIsaac v. Heneberry	20 Gr. 348	360
McKean (Geo.) & Co. v. Black	62 S.C.R. 290	376
MacKenzie, Re	[1945] O.R. 787	562
McKenzie (MacKenzie) v. Royal Bank	[1934] A.C. 468	380, 381
McKercher v. Sanderson	15 S.C.R. 296	141
Mackinley v. Bathurst	36 T.L.R. 31	27
McKinley and McCullough, Re	46 O.L.R. 535	866
McKinnon v. Gillard	9 O.W.R. 77	585
McLean v. McCannell	[1938] O.R. 37; [1937] S.C.R. 341	176
Maclean v. Workers' Union	[1929] 1 Ch. 602	389
McLeod v. Windsor	[1923] S.C.R. 696	216
McMaster Estate Assessment, Re ..	2 O.L.R. 474	217
McMillan v. Wallace	64 O.L.R. 4	870
McMullen v. Dr. Barnardo's Homes etc., Assn.	26 O.W.N. 168	580, 581
McMullen v. Wadsworth	14 App. Cas. 631	121
McNaghten's Case	10 Cl. & F. 200	468, 469, 488, 489
McNeil, Re	12 O.L.R. 208	858
McNeil v. McGillivray	42 N.S.R. 133	403
McNutt, Re	47 S.C.R. 259	561
McPhedran and Cleland v. Toronto..	[1932] O.R. 198	216

M.		
NAME OF CASE.	WHERE REPORTED.	PAGE.
Maccomb v. Welland	13 O.L.R. 335204, 311,	322, 325
Madill v. Thompson	[1939] O.W.N. 94	543
Maguire v. Maguire	50 O.L.R. 100, 579160, 730,	732, 734
Mahoney v. Ottawa	3 O.W.R. 695	790
Mailman Estate, Re	[1941] S.C.R. 368103, 104, 105,	109, 115
Makin v. Atty-Gen. for N.S.W.	[1894] A.C. 57	412
Malley v. Malley	25 T.L.R. 662	836
Malone v. Laskey	[1907] 2 K.B. 141	744
Mangena v. Wright	[1909] 2 K.B. 958	607
Mann v. Owen	9 B. & C. 595	563
Mansell v. R.	8 E. & B. 85	769
Mansergh, Re	1 B. & S. 400	79
Marangos v. Harold	52 O.L.R. 395	160, 174
Markadonis v. R.	[1935] S.C.R. 657	410, 767
Marley & Sandwich, Re	41 O.W.N. 178	217
Marney v. Scott	[1899] 1 Q.B. 986	753
Marshal v. Crutwell	L.R. 20 Eq. 328	105
Marshall v. Industrial Exhibition Assn.	1 O.L.R. 319; 2 O.L.R. 62	216
Marson v. Coulter	3 Sask. L.R. 485	156
Martin v. Benson	[1927] 1 K.B. 771	605
Mary, The	9 Cranch 145	404
Maxwell v. Callbeck	[1939] S.C.R. 440	176
Maxwell v. Director of Public Prosecutions	[1935] A.C. 309	773
May, Re	[1932] 1 Ch. 99	252, 253
May v. Roberts	48 B.C.R. 411	819, 821
Mayes v. T.T.C.	[1942] O.W.N. 271	330
Meakin v. Morris	12 Q.B.D. 352	18
Mechanical & General Inventions Co. v. Austin	[1935] A.C. 347	157, 605
Meigh v. Wickenden	[1942] 2 K.B. 160	218
Menary v. Menary	[1942] O.W.N. 417	730, 734
Menier v. Hooper's Telegraph Works	L.R. 9 Ch. 350	678, 693
Mercantile Union Guarantee Corp'n. v. Ball	[1937] 2 K.B. 498	27
Mercer, Ex parte; In re Wise	17 Q.B.D. 290	581
Merritt v. Toronto	22 O.A.R. 205	353
Mersey Docks & Harbour Board v. Procter	[1923] A.C. 253	330, 796
Metropolitan Ry. v. Jackson	3 App. Cas. 193	244, 330
Metropolitan Ry. v. Wright	11 App. Cas. 152	157, 161
Mewburn Estate, Re	[1939] S.C.R. 75	296
Midland Bank Executor, etc., Co. v. St. Bartholomew's Hospital.	[1943] Ch. 277	889
Millar v. Macdonald	14 P.R. 499	730
Milligan v. Jamieson	4 O.L.R. 650	617
Minkler v. McMillan	10 P.R. 506	831
Misner v. Toronto & York Radial R.W. Co.	11 O.W.R. 1064	539
Mitchell, Re	13 Q.B.D. 418	122
Mitchell v. Mitchell	44 Man. R. 23	158, 166
Mitchell v. Tracey and Fielding	58 S.C.R. 640	561, 564
Montgomery and Raleigh, Re	21 U.C.C.P. 381	270
Montreal Alberta Petroleums Ltd., Re	[1939] O.W.N. 20	230
Mordaunt v. Mordaunt	L.R. 2 P. & D. 103	699
Morelli v. R.	52 Que. K.B. 440	187, 192
Morris v. Hoyle	28 U.C.C.P. 598	750
Morrison, Fleet & Co. v. Fletcher	17 T.L.R. 95	27, 29
Mosely v. Koffyfontein Mines Ltd.	[1911] 1 Ch. 73; [1911] A.C. 409	659

NAME OF CASE.	WHERE REPORTED.	PAGE.
Mott v. Trott	[1943] S.C.R. 256	868, 870
Murdock v. Pennsylvania (Jeanette)	319 U.S. 105	92
Murphy v. Ottawa	63 O.L.R. 247; [1929] S.C.R. 541	791
Murton, Re	26 O.W.N. 325	425
Mutrie v. Alexander	23 O.L.R. 396	90

N.

Naegele v. Oke	37 O.L.R. 61	69
Nasmith v. Telford	[1945] 4 D.L.R. 450	160, 161
Nerlich, Re	40 O.W.N. 241	229
Neville v. Benjamin	[1902] 1 Ch. 723	859
Newton v. Brantford	1 O.W.N. 965	329
Newton v. Hardy	149 L.T. 165	158, 697, 715, 724
Nixon v. Ottawa Electric Ry.	[1933] S.C.R. 154	238
Nocton v. Ashburton	[1914] A.C. 932	658
Norman v. Great Western Ry.	[1915] 1 K.B. 584	329, 335, 336, 459
Norris v. Seed	3 Ex. 782	713
North West Transportation Co. v. Beatty	12 App. Cas. 589	678
Norton v. Yates	[1906] 1 K.B. 112	304
Nouvion v. Freeman	15 App. Cas. 1	733

O.

Obert v. Barrow	35 Ch. D. 472	353
O'Connor v. Kennedy	15 O.R. 20	858, 859
O'Connor v. Star Newspaper Co.	68 L.T. 146	605, 608
Official Receiver, Ex parte	10 Morr. 1	230
Offord v. Hiscock	86 L.J.K.B. 941	92
Oliver v. Woodroffe	4 M. & W. 650	34
Olsson v. Fraser	[1945] O.R. 69	375, 870, 875
Olsson v. A.O.U.W.	38 O.L.R. 268	862
Onslow, Re	39 Ch. D. 622	297
Osolsky v. Schwartz	37 O.W.N. 121	818
Ottawa v. G.T.R.	50 O.L.R. 239	204
Ottawa v. Ottawa & New York Ry.	50 O.L.R. 239	204
Ottawa v. Ottawa Public School Board	54 O.L.R. 414, 633	217
Ottawa and Grey Nuns, Re	29 O.L.R. 568	218, 227
Ottawa Y.M.C.A. v. Ottawa	29 O.L.R. 574	218
Ouellette v. C.P.R.	[1925] A.C. 569	620
Overton v. Banister	3 Hare 503	34
Owen Sound Lumber Co., Re	34 O.L.R. 528; 38 O.L.R. 414	571, 572, 682, 687

P.

Palmolive Mfg. Co. v. R.	[1933] S.C.R. 131	45, 685
Parker v. Dymont-Baker Lumber Co.	6 O.W.N. 559	329
Parkinson, Re	9 T.L.R. 388	230
Parkinson v. Potter	16 Q.B.D. 152	217
Parks v. Maybee	2 U.C.C.P. 257	23, 31
Parmiter v. Coupland	6 M. & W. 105	607, 609
Paterson v. Gas, Light & Coke Co.	[1896] 2 Ch. 476	192
Paterson v. Paterson	3 H.L. Cas. 308	588
Patterson v. Toronto General Trusts Corp.	15 O.W.N. 42	821
Patton v. Yukon Consolidated Gold Corp.	[1934] O.W.N. 321	682, 684
Paul v. Dauphin	49 Man. R. 95	790
Peacock v. Frigout	[1893] 1 Ch. 54	888
Pearks v. Moseley	5 App. Cas. 714	258, 886
Pearl v. Pearl	[1943] O.R. 720	157, 167

NAME OF CASE.	WHERE REPORTED.	PAGE.
Pearson v. Coles	1 Mood. & R. 206	311
Peck and Galt, Re	46 U.C.Q.B. 211	844
Pender v. Lushington	6 Ch. D. 70	572
Peterkin v. McFarlane	9 O.A.R. 429; 13 S.C.R. 677	867
Pfister v. T.T.C.	[1946] O.R. 328	459
Phené's Trusts, Re	L.R. 5 Ch. 139	855, 858, 861, 862
Phillips v. Greater Ottawa Develop- ment Co.	38 O.L.R. 315	21
Phillips Academy Trustees v. And- over	175 Mass. 118	228
Piers v. Piers	2 H.L. Cas. 331	855, 858
Pinsonneault, Re	34 O.L.R. 388	862
Pioneer Laundry & Dry Cleaners Ltd. v. Minister of National Revenue	[1940] A.C. 127	45
Pittard v. Oliver	[1891] 1 Q.B. 474	606, 609
Place v. Searle	[1932] K.B. 497	700, 714, 724
Plant, Ex parte	9 T.L.R. 388	230
Plater v. Brealey	[1938] O.W.N. 365; [1939] O.W.N. 203	102, 103, 105
Plowden v. Gaybord	39 Ch. D. 622	297
Plowden v. Lawrence	[1929] 1 Ch. 557	353
Polini v. Gray	12 Ch. D. 411	314
Porter & Sons v. Muir Bros. Dry Dock Co.	63 O.L.R. 437	755
Powell v. Powell	L.R. 3 P. & D. 186	64
Powell v. Streatham Manor Nurs- ing Home	[1935] A.C. 243	204
Pratt v. Scheveck	21 Sask. L.R. 154	502
Price & Co. v. Union Lighterage Co.	[1903] 1 K.B. 750	755
Procurator-General v. Spencer	[1945] A.C. 124	685
Prohibition Act and Tosey, Re	29 B.C.R. 438	399, 401, 405
Proprietary Articles Trade Assn. v. Atty-Gen. for Canada	[1931] A.C. 310	563
Prosko v. R.	63 S.C.R. 226	479
Public Trustee v. Bryant	[1936] 2 All E.R. 878	263, 264
Public Trustee v. Coleman	[1936] Ch. 528	888
Pyett v. Lampman	53 O.L.R. 149	17, 20

Q.

Queen, The, see "R."

Quick v. Church	23 O.R. 262	695, 697, 720, 725, 726
Quinn v. Leathem	[1901] A.C. 495	699, 711, 718
Quintrell, Ex parte	[1922] T.P.D. 14	123
Quirk v. Thomas	[1916] 1 K.B. 516	869, 877, 879

R.

"R." denotes Rex or Regina.

R. v. Ambrey	[1934] 3 W.W.R. 465	401
R. v. Anderson	7 Alta. L.R. 102	489
R. v. Baker	[1929] S.C.R. 354	554
R. v. Baldwin and O'Sullivan	[1945] O.W.N. 523	809, 810
R. v. Barnes	49 O.L.R. 374	780
R. v. Barrs	[1946] 1 W.W.R. 328	410
R. v. Baugh	38 O.L.R. 559	769
R. v. Bower	[1941] O.R. 51	176, 554
R. v. Bowman	[1939] O.R. 421	127
R. v. Brockenshire and Clarkson	[1931] O.R. 806	466
R. v. Brown	[1945] O.R. 869	772
R. v. Brown	17 O.L.R. 197	94
R. v. Brunton	59 B.C.R. 182	128
R. v. Burke	44 C.C.C. 205	399
R. v. Carr	[1937] O.R. 600	176, 184, 809

NAME OF CASE.	WHERE REPORTED.	PAGE.
R. v. Cherry	12 Cox C.C. 32	770, 772
R. v. Cho Chung	55 B.C.R. 234	199, 200, 201
R. v. Church Assembly, Legislative Committee	[1928] 1 K.B. 411	393
R. v. Clark	3 O.L.R. 176	515
R. v. Clewes	4 C. & P. 221	407
R. v. Coldwell and Ryder	2 W. & W. 208	765, 770
R. v. Colvin and Gladue	58 B.C.R. 204	200, 201
R. v. Connolly and McGreevy	25 O.R. 151	771
R. v. Coote	L.R. 4 P.C. 599	517, 519, 765, 767, 772, 779, 847
R. v. Costello	[1932] O.R. 213	410
R. v. Crisp and Homewood	83 J.P. 121	768
R. v. Crowe and Myerscough	81 J.P. 288	408
R. v. Croydon	2 Cox C.C. 67	764, 771
R. v. DeBrue	60 O.L.R. 277	508
R. v. Dickout	24 O.R. 250	96
R. v. Dinnick	3 Cr. App. R. 77	467
R. v. Doherty	16 Cox C.C. 306	553
R. v. Donaldson	24 U.C.C.P. 148	320, 326
R. v. Dudman	4 B. & C. 850	769
R. v. Eakins	[1943] O.R. 199	696, 720
R. v. Electricity Commrs.	[1924] 1 K.B. 171	388, 393, 395, 396
R. v. Erdheim	[1896] 2 Q.B. 260	516
R. v. Ferguson	[1945] O.W.N. 1	554, 556
R. v. Findlay	60 B.C.R. 481	767
R. v. Garrett; Ex parte Sharf ..	[1917] 2 K.B. 99	561
R. v. Gillis	11 Cox C.C. 69	770
R. v. Glamorganshire	1 Ld. Raym. 580	394
R. v. Glenfield	[1934] 3 W.W.R. 465	401
R. v. Goldshede and Sidney	1 Car. & K. 656	770
R. v. Gray	6 Cr. App. R. 242	408
R. v. Greisman	59 O.L.R. 156	553
R. v. Gun Ying	65 O.L.R. 369	187, 188, 192, 197
R. v. Haddy	[1944] K.B. 442	772
R. v. Hallinan, Re	[1937] O.W.N. 325	401
R. v. Hammond	28 Cr. App. R. 84	520, 764, 765
R. v. Hammond	29 O.R. 211	515
R. v. Hardy	24 State Tri. 199	771
R. v. Harms	[1936] 2 W.W.R. 114	767
R. v. Harris	3 Burr. 1330	507
R. v. Haworth	4 C. & P. 254	779
R. v. Hendershott and Welter ..	26 O.R. 278	514, 515
R. v. Hendon Council	[1933] 2 K.B. 696	395
R. v. Higgins	3 C. & P. 603	407, 415, 416
R. v. Holden	5 B. & Ad. 347	509
R. v. Howlett	39 Man. R. 206	399
R. v. Huggins	[1895] 1 Q.B. 563	388
R. v. Hughes	57 B.C.R. 521; [1942] S.C.R. 517 ..	767
R. v. Hughes	[1942] S.C.R. 517	407, 409, 411, 415, 416, 767
R. v. Hughes	[1934] 3 W.W.R. 465	401
R. v. Irish	18 O.L.R. 351	197
R. v. Jackson	[1933] O.R. 522	407, 411, 415
R. v. Jackson	40 O.L.R. 173	561
R. v. Jackson	[1891] 1 Q.B. 671	698, 712, 713
R. v. Jacobs	[1944] K.B. 417	431
R. v. Jones	2 C. & P. 629	407, 416
R. v. Keating	2 Cr. App. R. 61	467
R. v. Kierstead	33 C.C.C. 288	489
R. v. Kong	20 B.C.R. 71	408, 764
R. v. Krawchuk	75 C.C.C. 219	407
R. v. Large	27 Cr. App. R. 65	553
R. v. Leaf	20 Sask. L.R. 542	555

NAME OF CASE.	WHERE REPORTED.	PAGE.
R. v. Lee Fong Shee	47 B.C.R. 205	188
R. v. Lew Chew	55 B.C.R. 385	200
R. v. London Appeals Committee JJ.	[1946] 1 K.B. 176	563
R. v. London County Council	[1892] 1 Q.B. 190	388
R. v. London County Council; Ex p. Entertainments Protection Assn.	[1931] 2 K.B. 215.....388, 390, 395	
R. v. MacDonald	[1945] O.W.N. 430	412
R. v. MacDonald	[1943] O.R. 158	556
R. v. McDonald	[1940] O.R. 7	156
R. v. MacDonald	[1939] O.R. 606	410, 412
R. v. MacKenzie	[1946] 1 D.L.R. 584	562
R. v. Martin	[1944] O.W.N. 19	398
R. v. McGill	23 Sask. L.R. 299	467, 469
R. v. Merceron	2 Stark. 366	779
R. v. Merritt	[1934] O.R. 392	556
R. v. Meyrick	21 Cr. App. R. 94	785
R. v. Miles	9 M.P.R. 554	398
R. v. Mitchell	24 O.L.R. 324	79
R. v. Montreal	[1945] S.C.R. 621	537
R. v. Myles	56 N.S.R. 18	765
R. v. Nadan	21 Alta. L.R. 231	398
R. v. Nat Bell Liquors Ltd.	[1922] 2 A.C. 128	564
R. v. Nuttall	1 Cr. App. R. 180	809
R. v. O'Gorman	14 O.L.R. 102	508
R. v. O'Keefe	14 N.S.W.L.R. 343	764, 770
R. v. Petch	35 Man. R. 299	809
R. v. Ponton	18 P.R. 210	508
R. v. Postmaster-General; Ex parte Carmichael	[1928] 1 K.B. 291	388
R. v. Rash	53 O.L.R. 245	20, 30, 149
R. v. Ribuffi	21 Cr. App. R. 94	785
R. v. Roberts	28 Cr. App. R. 102	553
R. v. Robitaille	[1945] R.L. 149	127
R. v. Rule	[1937] 2 K.B. 375	609
R. v. St. Pancras Assessment Com- mittee	2 Q.B.D. 581	192, 218
R. v. Scott	Dears. & B. 47516, 517, 519, 765, 767, 770, 772, 779, 780,	847
R. v. Simington	[1921] 1 K.B. 451	768
R. v. Sloggett	Dears. C.C. 656	770
R. v. Snyder	54 C.C.C. 386	399, 401
R. v. Spencer	10 Cox C.C. 525	554
R. v. Standard Finance Corpn.	43 Man. R. 110	399, 401
R. v. Steffoff	20 O.L.R. 103	479
R. v. Stein	[1934] 3 W.W.R. 465	401
R. v. Steinson	[1945] 3 W.W.R. 438	764, 770
R. v. Steptoe	4 C. & P. 397	407
R. v. Stewart	[1944] 2 W.W.R. 86	95
R. v. Stone	6 Cr. App. R. 89	408
R. v. Storgoff	[1945] 3 D.L.R. 563	561, 562, 564
R. v. Tass	54 Man. R. 1	765, 771, 780
R. v. Thames Waterman and Light- ermen	[1897] 1 Q.B. 659	390
R. v. Thompson	[1893] 2 Q.B. 12764, 771, 772,	779
R. v. Tilford	[1936] O.R. 35	467, 478
R. v. Walker	[1938] O.R. 636; [1939] S.C.R. 214	848
R. v. Walker and Chinley	15 B.C.R. 100	556
R. v. Wambolt	13 M.P.R. 409	810
R. v. Warickshall	1 Leach 263	779
R. v. Wark	33 L.Jo. 615	773
R. v. Warner	1 Cr. App. R. 227	467
R. v. Watson	50 B.C.R. 531	554
R. v. Weighill	61 B.C.R. 140	765

NAME OF CASE.	WHERE REPORTED.	PAGE.
R. v. West	57 O.L.R. 446410, 466, 467,	468, 480
R. v. Williams	28 O.R. 583	514, 515
R. v. Williamson	3 C. & P. 635	554
R. v. Wilson	4 Alta. L.R. 35	771
R. v. Winkel	76 J.P. 191	408
R. v. Wong Chew	[1934] 3 W.W.R. 465	401
R. v. Woodhouse	[1906] 2 K.B. 501388, 390,	395
R. v. Zimmerman	37 B.C.R. 277	809
R. ex rel. Peters v. Harrison	52 Man. R. 28	79
Rainbow Chemical Works Ltd. v. Belvedere Fish Guano Co.	[1921] 2 A.C. 465	684
Raleigh and Harwich, Re	26 O.A.R. 313270, 279,	285
Randal v. Payne	1 Bro. C.C. 55	252
Read v. Operative Stonemasons ..	[1902] 2 K.B. 732	691
Regal (Hastings) Ltd. v. Gulliver ..	[1942] 1 All E.R. 378	657
Reid, Re	50 O.L.R. 595	105, 106
Reid, Re	6 O.L.R. 421	364
Reid v. Mimico	59 O.L.R. 579	744, 752
Richards v. Morris	[1915] 1 K.B. 221	534
Richardson v. Windsor	[1942] O.R. 1	632, 633
Richer, Re	46 O.L.R. 367	521, 525
Rideau Club v. Ottawa	15 O.L.R. 118	230
Rider v. Ford	[1923] 1 Ch. 541	740
Rigby v. Connol	14 Ch. D. 482	389, 397
Riley v. Brown	98 L.J.K.B. 739	879
Robb v. Robb	20 O.R. 591	858
Roberts v. Gray	[1913] 1 K.B. 520	22
Robertson v. G.T.R.	24 S.C.R. 611	760
Robertson v. Robertson	16 O.L.R. 170	734
Robins v. National Trust Co.	[1927] A.C. 514	156
Robins v. Robins	[1907] 2 K.B. 13	735
Robinson v. Hardcastle	2 Term. Rep. 241	889
Robinson v. Robinson	1 Sw. & Tr. 362	575
Robinson v. Royal Trust Co.	[1939] S.C.R. 75	296
Roblin v. Drake	[1938] O.R. 711818, 822,	827
Roddy v. Fitzgerald	6 H.L. Cas. 823	295, 297
Rose v. Peterkin	13 S.C.R. 677	867
Ross, Re	7 O.L.R. 493	253
Ross v. Ellison or Ross	[1930] A.C. 1	121
Royal Bank v. R.	[1913] A.C. 283	307
Royal Trust Co. v. T.T.C.	[1935] S.C.R. 671	240
Ruislip-Northwood Council v. Lee..	145 L.T. 208	91
Rumsey v. Webb	Car. & M. 104	604
Russell, Re	52 L.T. 559	258
Russell v. Russell	[1924] A.C. 687	574
Russell v. Russell	[1895] P. 315; [1897] A.C. 395...	588
Russell v. Scott	55 C.L.R. 440	105, 110
Russell Industries Ltd. and Toron- to, Re	[1941] O.W.N. 147	44
Russian Commercial & Industrial Bank v. British Bank for For- eign Trade Ltd.	[1921] 2 A.C. 43890, 91	
Ryan, Re	32 O.R. 224	114
Ryan v. Youngs	[1938] 1 All E.R. 522	799
Rylands v. Fletcher	L.R. 3 H.L. 330	631

S.

St. Catharines v. Hulse	[1936] O.W.N. 211	549
St. Catharines Improvement Co. v. Rutherford	31 O.L.R. 574	22
St. Helen's Colliery Co. v. Hewit- son	[1924] A.C. 59	533
St. Jean v. Molleur	40 S.C.R. 629	837
St. Mary's Creamery Co. v. G.T.R....	8 O.L.R. 1	760

NAME OF CASE.	WHERE REPORTED.	PAGE.
Salaman, Ex parte	21 Ch. D. 394	229
Salaman v. Warner	[1891] 1 Q.B. 734	826
Salem Lyceum v. Salem	154 Mass. 15	228
Salomon v. A. Salomon & Co.	[1897] A.C. 22	45, 684
Saltmarsh v. Adair	[1942] S.C. (J.) 58	92, 94
Sands Ale Brewing Co., Re	3 Bissell 175	303
Saskatchewan Ins. Act, Re	[1944] 2 W.W.R. 402	364
Saskatoon Episcopal Corpn. v. Sas- katoon	[1936] 2 W.W.R. 91	92
Saugeen v. Church Society	6 Gr. 538	326
Scadding, Re	4 O.L.R. 632	425
Scammell v. Clarke	23 S.C.R. 307	617
Schmidt v. R.	[1945] S.C.R. 438	412
Schwent v. Roetter	21 O.L.R. 112	114
Scott, Re	58 O.L.R. 138	523, 524
Scott v. Sampson	8 Q.B.D. 491	606
Scott v. Scott	[1913] P. 52	836
Scully v. Madigan	4 O.W.N. 394	389
Seames v. Belleville	12 O.W.N. 414	791
Seguin v. Laferriere	25 O.W.N. 607	716
Selby v. Greaves	37 L.J.C.P. 251	69
Sellars v. Sellars	[1942] S.C. 206	122
Sershall v. T.T.C.	[1939] S.C.R. 287	238
Setter v. Wilson	37 Pac. (2d) 50	230
Sharf, Ex parte	[1917] 2 K.B. 99	561
Shaw v. Gt. Western Ry.	[1894] 1 Q.B. 373	755, 757, 759
Shawaga Estate, Re	[1944] 2 W.W.R. 402	364
Shelley's Case	1 Co. Rep. 93b	292, 293, 294, 295, 297
Shephard v. Shephard	56 O.L.R. 555	581
Sheppard v. Macinnis and Canadian Industries Ltd.	[1933] O.W.N. 395	156
Sheppard v. Sheppard	51 O.L.R. 520	697, 720
Sheppard Publishing Co. v. Press Publishing Co.	10 O.L.R. 243	744
Sherrington v. St. Paul's Cathedral ..	25 T.L.R. 753	352
Shiffman v. St. John of Jerusalem ..	[1936] 1 All E.R. 557	636
Shoesmith, Re	[1938] 2 K.B. 637	696, 720
Shubbrook v. Tufnell	9 Q.B.D. 621	826
Shuttleworth v. Cox Bros. & Co.	[1927] 2 K.B. 9	679
Sifton v. Sifton	[1938] A.C. 656	254, 263
Simmonds v. Elliott	[1917] 2 K.B. 894	93
Simonds v. Chesley	21 S.C.R. 174	617
Simpkins v. Old Colony Trust Co.	151 N.E. 87	365
Simpson v. Chase	14 P.R. 280	303, 304
Sinnott v. Bowden	[1912] 2 Ch. 414	304
Sitkoff v. Toronto R. W. Co.	36 O.L.R. 97	245
Skaith v. Skaith	[1936] O.W.N. 558	56
Skeate v. Slaters Ltd.	[1914] 2 K.B. 429	608
Skues v. Lyon	[1936] Ch. 309	888
Slattery v. Haley	52 O.L.R. 95	799, 805
Slattery v. Slattery	[1945] O.R. 811	380
Sleat v. Fogg	5 B. & Ald. 342	755
Sleeth v. Hurlbert	25 S.C.R. 620	402, 403
Smeeton v. Atty.-Gen.	[1920] 1 Ch. 85	91
Smith v. Anderson	15 Ch. D. 247	230
Smith v. Atty.-Gen. for Ont.	53 O.L.R. 572; [1924] S.C.R. 331	324
Smith v. Atty.-Gen. for Ont.	52 O.L.R. 469	90
Smith v. Gosnell	43 O.L.R. 123	104, 106, 110
Smith v. Humbervale Cemetery Co.	33 O.L.R. 452	659
Smythe v. R.	[1941] S.C.R. 17	467, 469, 487, 489
Soan and Morley, Ex parte	[1896] 2 Q.B. 407	230
Sodeman v. R.	[1936] 2 All E.R. 1138	490
Soden and Alexander's Contract, Re	[1918] 2 Ch. 258	866

NAME OF CASE.	WHERE REPORTED.	PAGE.
Somers v. Kingsbury	54 O.L.R. 166	158
Somerville v. Hawkins	10 C.B. 583	608
Southby v. Southby	40 O.L.R. 429	104, 106, 110, 115
Speers v. Griffin	[1939] O.R. 552	176
Spelman v. Spelman	59 B.C.R. 120	827
Spencer v. Alaska Packers Assn.	35 S.C.R. 362	157
Spencer v. Ancoats Vale Rubber Co.	58 L.T. 363	730
Spurgin v. White	2 Giff. 473	501
Stadler v. Bank of Commerce	64 O.L.R. 69	521
Staley v. B.C. Electric Ry.	[1938] S.C.R. 387	238
Standen v. South Essex Recorders Ltd.	50 T.L.R. 365	602
Standing v. Bowring	31 Ch. D. 282	106
Stanley & Bunting, Re	26 O.W.N. 452	23
Stanley v. Hayes	8 O.L.R. 81	799
Staples v. Great American Ins. Co.	[1941] S.C.R. 213	349, 350, 351
Stark v. Batchelor	63 O.L.R. 135	340
Starkman & Co. v. Angier Line, Ltd.	[1891] 1 Q.B. 619	755, 760, 761
Stephens and Moore	25 O.R. 600	270, 274, 286, 288
Stewart, Re	3 DeG. & Sm. 557	230
Stewart v. Boulton	[1928] Ch. 703	384
Stewart v. Woolman	26 O.R. 714	156
Stirland v. Director of Public Prosecutions	[1944] A.C. 315	772
Stockfleth v. De Tastet	4 Camp. 10	770
Storgoff, Re	[1945] S.C.R. 526	561, 562, 564
Storry v. C.N.R.	[1941] 4 D.L.R. 169	160, 161
Stratheden and Campbell (Lord), Re	[1894] 3 Ch. 265	889
Straus Land Corp'n. v. International Hotel Windsor Ltd.	45 O.L.R. 145	14
Stuart v. Bank of Montreal	41 S.C.R. 516	720, 728
Stuart v. Bell	2 Q.B. 341	604
Sturla v. Freccia	5 App. Cas. 623	314
Sutherland, Re	2 O.W.N. 1386	886
Sutherland v. G.T.R.	18 O.L.R. 139	760
Swaizie v. Swaizie	31 O.R. 324	734
Swartz Bros. Ltd. v. Wills	[1935] S.C.R. 628	248
Sweeney v. Coote	[1907] A.C. 221	674, 681, 690
Switzer v. Ottawa	63 O.L.R. 168	744
Sydney v. Atty.-Gen. for N.S.W.	[1894] A.C. 444	841
Sykes v. Dixon	9 A. & E. 693	31

T.

Taggard v. Innes	12 U.C.C.P. 77	799
Talmage v. Talmage	62 O.L.R. 209	696, 698, 716, 727
Taxation Commrs. v. St. Mark's Glebe	[1902] A.C. 416	227, 228
Taylor, Re	21 Ch. D. 394	229
Taylor v. Croker	4 Esp. 187	23
Tegg, Re	[1936] 2 All E.R. 878	263, 264
Telegraph Newspaper Co. v. Bedford	50 C.L.R. 632	609
Telford v. Secord	[1945] 4 D.L.R. 450	160, 161
Thirkell v. Cambi	[1919] 2 K.B. 590	385, 386
Thomas, Re	[1891] 3 Ch. 482	426
Thomas v. Powell	57 J.P. 329	434
Thomas's Licence, Re	26 O.R. 448	390
Thompson, Re	44 W.R. 582	254
Thompson v. Coulter	34 S.C.R. 261	868
Thompson v. Fraser Companies Ltd.	[1930] S.C.R. 109	159
Thompson and Jenkins, Re	63 O.L.R. 33	866

NAME OF CASE.	WHERE REPORTED.	PAGE.
Thornhill v. Weeks	[1913] 2 Ch. 464	311
Tolhurst v. Associated Portland Cement Mfrs. Ltd.	[1903] A.C. 414	381
Tollemache v. Hobson	5 B.C.R. 214	820
Topping v. Oshawa Street Ry.	66 O.L.R. 618	251
Toronto v. Foss	27 O.L.R. 612	551
Toronto v. Pilkington Bros. Ltd. and Weber	7 O.W.N. 806; 8 O.W.N. 486 ...	315
Toronto v. Rogers-Majestic Corp'n.	[1943] O.R. 1; [1943] S.C.R. 44043, 45, 50, 51	
Toronto v. R. C. Separate Schools of Toronto	[1926] A.C. 81.437, 446, 448, 450, 452	
Toronto v. York	[1938] A.C. 415	352
Toronto and Famous Players Canadian Corp'n., Re	[1935] O.R. 314; [1936] S.C.R. 14142, 44, 51, 218	
Toronto and Frankland, Re	[1939] O.R. 357	230
Toronto and G. T. Fulford Co., Re.	22 O.W.N. 50	43
Toronto and John Northway & Son Ltd., Re	54 O.L.R. 81	43, 45, 50
Toronto and Toronto Ry., Re	42 O.L.R. 413	827
Toronto Board of Education and Miller v. Monarch Brass Mfg. Co.	24 O.W.N. 490; 25 O.W.N. 705430, 431	
Toronto Ry. v. R.	[1908] A.C. 260	160
Tosey and Prohibition Act, Re	29 B.C.R. 438	399, 401, 405
Townsend v. Rumball	19 O.L.R. 433	22
Transvaal Lands Co. v. New Belgium (Transvaal) Land & Development Co.	[1914] 2 Ch. 488	657
Trott v. Mott	[1944] 3 D.L.R. 58	868
Trott v. Mott	[1942] O.W.N. 513; [1943] S.C.R. 256868	
Trottier v. Rajotte	[1940] S.C.R. 203	121, 124
Trubenizing Process Corp'n. v. John Forsyth Ltd.	[1943] S.C.R. 422	380
Trusts & Guarantee Co. v. Smith ...	33 O.L.R. 155	819
Turner v. Walsh	6 App. Cas. 636	203
Tweney v. Tweney	[1946] P. 180	859

U.

Udny v. Udny	L.R. 1 H.L. Sc. 441	120
Union of London & Smith's Bank Ltd. v. Wasserberg	[1915] 1 Ch. 195365, 366, 370, 373	
United States v. Bainbridge	1 Mas. 71	18
U.S.A. v. Gaynor	[1905] A.C. 382	79
U.S. ex rel. Hull v. Stalter	61 Fed. Supp. 732	92
Upper Canada Estates Ltd. and MacNicol, Re	[1931] O.R. 465; [1932] 2 D.L.R. 528452	
Upton v. Great Central Ry.	[1924] A.C. 302	531

V.

Vancouver v. Atty.-Gen. of Can.	[1944] S.C.R. 23	217
Vancouver v. Burchill	[1932] S.C.R. 620	324
Van Grutten v. Foxwell	[1897] A.C. 658	293, 295
Van Velsor v. Hughson	9 O.A.R. 390	313
Vaughan, Re	33 Ch. D. 187	360
Vaughan v. Thomas	33 Ch. D. 187	360

W.

Wabash Ry. v. Follick	60 S.C.R. 375	243
Wabash Ry. v. Misener	38 S.C.R. 94	248

NAME OF CASE.	WHERE REPORTED.	PAGE.
Wadsworth v. McCord	12 S.C.R. 466; 14 App. Cas. 631.	121
Wainwright v. Miller	[1897] 2 Ch. 255	252
Walker, Re	56 O.L.R. 517	258, 523, 524
Walker v. Midland Ry.	55 L.T. 489	429, 457, 461, 462
Walker v. R.	[1939] S.C.R. 214	518, 764, 771,
	772, 847, 848, 851,	852
Walkerville and Walker, Re	[1935] O.W.N. 168	218, 219
Wallace v. G.T.R.	49 O.L.R. 117	249
Waller v. Loch	7 Q.B.D. 619	603
Walsh v. International Bridge & Terminal Co.	44 O.L.R. 117	429
Wandsworth Board of Works v. U.S. Telephone Co.	13 Q.B.D. 904	285
Ward v. Turner	2 Ves. Sen. 431	364
Warren v. Rudall	29 L.J. Ch. 543	354
Wason v. Walter	L.R. 4 Q.B. 73	706
Wasserberg, Re	[1915] 1 Ch. 195	365, 366, 370, 373
Watt v. Gore District Mutual Ins. Co.	8 Gr. 523	303
Wayman v. Perseverance Lodge ...	[1917] 1 K.B. 677	396
Wedgwood, Re	[1915] 1 Ch. 113	359
Weese v. Weese	37 O.L.R. 649	114
Weinraub v. R.	[1932] S.C.R. 279	2, 7
Weiss v. Mount Vernon	157 App. Div. 383; 215 N.Y. 657 ..	320
Welch v. Welch	115 L.T. 1	56
Weld-Blundell v. Stephens	[1920] A.C. 956	632
Weldon v. Winslow	13 Q.B.D. 784	701
Wells, Re	[1944] O.W.N. 428	229
Westenfelder v. Hobbs Mfg. Co....	57 O.L.R. 31	329, 339
Western Canada Flour Mills Ltd., Ex parte	40 O.W.N. 241	229
Westminster v. Southern Ry.	[1936] A.C. 511	223
Weston, Re	[1902] 1 Ch. 680	365, 372
Weston v. Perry	1 O.W.N. 155	695, 716, 727
Wettlaufer v. Scott	20 O.A.R. 652	24
Whalen v. R.	28 U.C.Q.B. 108	564
Whimbey v. Whimbey	45 O.L.R. 228	588
Whitehead v. North Vancouver	53 B.C.R. 512	330
Whiteley v. Pepper	2 Q.B.D. 276	744
Whittaker, Re	21 Ch. D. 657	364
Wiedemann v. Walpole	[1891] 2 Q.B. 534	868
Wilhelm v. Wilhelm	[1938] O.R. 93	834, 836
Wilkes v. Allington	[1931] 2 Ch. 104	368
Wilkins (Fred.) & Bros. Ltd. v. Weaver	[1915] 2 Ch. 322	709
Wilkinson v. Oshawa	59 O.L.R. 520	170
Williams, Re	[1946] O.W.N. 805	884
Williams v. Curzon Syndicate Ltd..	35 T.L.R. 475	755
Williams v. Kershaw	5 L.J. Ch. 84	885
Williams v. Williams	5 L.J. Ch. 84	885
Wilmot v. Kingston	[1945] O.R. 532	438, 444, 447,
		448, 449
Wilson v. Canadian Development Co.	33 S.C.R. 432	755
Wilson v. Church	13 Ch. D. 1	674
Wilson v. London Free Press Print- ing Co.	44 O.L.R. 12	616
Wilson v. Zeron	[1942] O.W.N. 195	799
Wilton v. Hays	1 L.T.O.S. 263	364
Winans v. Atty.-Gen.	[1904] A.C. 287	120
Windsor (C. S.) Ltd. v. Windsor ...	17 B.C.R. 105	390
Winnipeg Electric Co. v. Geel	[1932] A.C. 690	799
Winsmore v. Greenbank	Willes 577	173, 700, 709, 710, 718
Winter v. Henn	4 C. & P. 494	167
Wisdom v. Brown	1 T.L.R. 412	604, 606

NAME OF CASE.	WHERE REPORTED.	PAGE.
Wise, Re	17 Q.B.D. 290	581
Wiznoski v. Peteroff	[1938] O.R. 113	744
Wolff, Re	[1943] O.W.N. 470	353
Wood v. Cox	5 T.L.R. 272	608
Wood v. Dixie	7 Q.B. 892	585
Wood v. Thomas	[1891] 3 Ch. 482	426
Wood v. Wood	57 L.J. Ch. 1	64
Woodall v. Clifton	[1905] 2 Ch. 257	740, 741, 742
Workmen's Compensation Board v. C.P.R.	[1920] A.C. 184	306
Workmen's Compensation Board v. Graham and Barrow	61 B.C.R. 36	305
Workmen's Compensation Board and Glover v. Rutherford	59 O.L.R. 364	540
Worthing v. Heather	[1906] 2 Ch. 532	889
Worthington v. Robbins and Cadi- gan	56 O.L.R. 285	620
Worts v. Worts	18 O.R. 332	43
Wray v. Steele	2 Ves. & B. 388	141
Wright v. C.N.R.	[1938] O.R. 66	237
Wright v. Cedzich	43 C.L.R. 493	697, 715, 720
Wyndham v. Wycombe	4 Esp. 16	166

Y.

Young v. Bristol Aeroplane Co.	[1944] K.B. 718	696, 720
Young v. Derenzy	26 Gr. 509	364
Young v. Ladies' Imperial Club Ltd...	[1920] 2 K.B. 523	390

Z.

Zilliax v. I.O.F.	13 O.L.R. 155	389
------------------------	---------------------	-----

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

1946

[COURT OF APPEAL.]

Rex v. Gross.

Criminal Law—Secret Commissions—Construction of Statute—“Corruptly”—The Criminal Code, R.S.C. 1927, c. 36, s. 504(2) (b).

The evil contemplated by s. 504(2) (b) of The Criminal Code is the giving of a gift or consideration, not *bona fide*, but *mala fide*, and designedly, wholly or partially, for the purpose of bringing about the result forbidden by the statute, *viz.*, the doing or forbearing to do any act relating to the affairs or business of the recipient's principal, or the showing or forbearing to show favour or disfavour to some person with relation to those affairs or that business. It is not necessary that the inducement should be directed to some specific act, or that it should be a bribe to do such an act. The word “corruptly” in the subsection imports nothing more than that the inducement or reward shall be designed to bring about the result prohibited thereby. *Re Launceston Election Petition* (1874), 30 L.T. 823 at 831, applied.

AN APPEAL by the Crown from the judgment of Parker Co. Ct. J., in the County Court Judges' Criminal Court for the County of York, acquitting the accused on a charge under s. 504(2) (b) of The Criminal Code, R.S.C. 1927, c. 36.

19th November 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and ROACH JJ.A.

J. J. Robinette, K.C., for the Attorney-General for Ontario, appellant: The trial judge did not direct his mind to the fundamental question, which was: What did the accused expect to get by this payment? It is immaterial whether there was a specific agreement to do some particular thing wrongfully. It is enough if the accused gave them money in order to have Cardoza “on his side”. The section refers to “doing any act”. The evidence indicates that the money was paid to Cardoza to influence him in making his report.

The trial judge was wrong in thinking that the word “corruptly” has reference to some specific act of wrongdoing. The word should be construed here as it was in *Re Launceston Election Petition* (1874), 30 L.T. 823 at 831, and *Re Bewdley Election Petition* (1869), 19 L.T. 676 at 678.

Section 504 is headed "Secret Commissions", not "Bribery"; the Crown is not required to establish all the elements of the offence of bribery at common law, as defined in Russell on Crimes and Misdemeanors, 8th ed., 1923, p. 588.

Hon. S. A. Hayden, K.C., for the accused, respondent: The trial judge came to the conclusion that Cardoza's evidence was not to be believed, and that he was not a credible witness. To support the theory of the Crown, Cardoza's evidence must be believed, as against that of the accused. [ROBERTSON C.J.O.: No man is more likely to be bribed than one who is himself not quite honest.]

Cardoza says he got this money to assist in getting a price increase. That was something that he could not do. [GILLANDERS J.A.: Does that make any difference if the accused thought he could?] Yes; s. 504 would not apply at all if the proposed act was not among Cardoza's duties to his employer. It is an essential ingredient to show that the money was paid to induce Cardoza to show favour, etc., in connection with his duty to his employer. Here he did nothing except in connection with a price increase, with which his employer had nothing to do, and which was not connected with his employment. Some indication of the accused's intention in giving the money may be gathered from what Cardoza purported to do. According to the Administrator's evidence, Cardoza saw him three times and telephoned him between three and six times.

This Court should not enlarge the scope of the charge on which we were tried, which referred only to Cardoza's duties to the Commodity Prices Stabilization Corporation.

The trial judge has made findings of fact, which should not be disturbed. The appeal is limited to questions of law, and the finding that there was no corruption is one of fact.

Even if the Court should find that there is some matter of law on which the trial judge erred, there has been no substantial wrong or miscarriage of justice, and the appeal should be dismissed under s. 1014(2).

J. J. Robinette, K.C., in reply: As to questions of law arising out of the trial judge's findings of fact, I refer to *Belyea v. The King*; *Weinraub v. The King*, [1932] S.C.R. 279, 57 C.C.C. 318, [1932] 2 D.L.R. 88.

Cur. adv. vult.

11th December 1945. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the Attorney-General for Ontario against the acquittal of the respondent by His Honour Judge Parker, in the County Court Judges' Criminal Court, on 14th December 1944, on the charge that the respondent "in the months of April and May in the year 1944, unlawfully did corruptly give or agree to give or offer a gift or consideration to C. C. Cardoza, a person employed by the Commodity Prices Stabilization Corporation as an inducement or reward or consideration to the said C. C. Cardoza for doing or forbearing to do, or for having done or forborne to do, an act relating to the affairs or business of the Commodity Prices Stabilization Corporation or for showing favour or forbearing to show disfavour to the National Rubber Company Limited with relation to the affairs or business of the Commodity Prices Stabilization Corporation, contrary to Section 504 of the Criminal Code of Canada."

By s. 1013(4) of The Criminal Code, R.S.C. 1927, c. 36, the right of appeal by the Attorney-General is limited to matters which involve a question of law alone. In his notice of appeal the appellant sets forth five grounds upon which he founds his appeal, each involving a question of law. They are as follows:

"1. That the learned trial Judge erred in refusing to permit counsel for the Crown to question C. C. Cardoza on his re-examination as to conversations which the said C. C. Cardoza had with one Reuben Gross, the brother of the accused.

"2. That the learned trial Judge erred as a matter of law in directing himself as to the essential ingredients of an offence under Section 504 (2) (b) of The Criminal Code.

"3. That the learned trial Judge erred as a matter of law in confining himself to a consideration of the question whether the moneys paid by the accused to C. C. Cardoza were paid as an inducement for doing or forbearing to do any act relating to his principal's affairs or business.

"4. That the learned trial Judge erred as a matter of law in his interpretation of the word 'corruptly' in section 504(2) (b) of The Criminal Code.

"5. That the learned trial Judge erred as a matter of law in holding that there was no evidence of corruption."

Before referring to the judgment pronounced by the learned trial judge, in order that the same may be the more understandable, it is necessary to state certain facts as they appear in evidence.

The accused Sam Gross is vice-president of National Rubber Company, Limited. His brother Reuben Gross is its president. The company is engaged in the business of manufacturing automobile tires and reliners and tire patches, and in the sale of used tires, and its place of business is in the city of Toronto. C. C. Cardoza is a special investigator employed by the Commodity Prices Stabilization Corporation, which is a Crown company. One Samuel Godfrey was the Used Goods Administrator of the Wartime Prices and Trade Board of Canada. Due to the exigencies of the war, and as a preventive against inflation, The Wartime Prices and Trade Board, by order, placed a ceiling price on the commodities manufactured and sold by the National Rubber Company, Limited, and other concerns carrying on similar business, and to assist such concerns in this economic constraint, subsidies were authorized by that Board to be paid to them. At the relevant times the subsidy was the differential between \$43 and the actual cost price per ton of used tires purchased by them. Most of these tires were purchased in the United States of America. Such parts of those tires as were suitable for reliners and tire patches were cut out from them, and the balance was classed as scrap rubber. The amount to be realized by the company from a ton of used tires would depend on the retail value of the reliners and patches salvaged therefrom. In the event of any changes either in the ceiling prices or in the subsidies, the procedure would be as follows: the Used Goods Administrator would make a recommendation to the head office of the Wartime Prices and Trade Board; that Board would consider the recommendation, and, if it should decide to make any change, it would pass the requisite order; the Commodity Prices Stabilization Corporation, while it was an entity separate and distinct from the Wartime Prices and Trade Board, was part of the machinery set up by the Government of Canada to cope with and administer the problem of price control; it was a monetary arm of the Wartime Prices and Trade Board, and as such it paid the subsidies as authorized by that Board; it had no jurisdiction to fix or alter the amount of the subsidies or the ceiling price. The same abnormal circum-

stances had brought about the creation of the two bodies, and they functioned in the same field, in capacities which differed, but were nevertheless related. As a result they collaborated with one another. Cardoza unquestionably was the servant of the Commodity Prices and Stabilization Corporation. In April 1944, he was sent from Ottawa to Toronto to investigate the subsidies that had been paid to National Rubber Company, Limited. At that time and prior thereto National Rubber Company, Limited was anxious to have the amount of the subsidies increased and/or the ceiling price raised. While in Toronto, Cardoza met the accused and his brother Reuben, and the matter of the increase in the subsidy and the increase in the ceiling price was discussed extensively by them with him. During these discussions Cardoza assisted Sam and Reuben Gross in framing a letter addressed to Mr. Godfrey, requesting a review of the "present set-up on tire reliners and tire patches for the purpose of either increasing the subsidy or a price increase", and advancing reasons intended to justify such increase.

Cardoza was not previously acquainted with either Sam Gross or Reuben Gross, although it was suggested in evidence that Reuben Gross had casually met Cardoza on a train somewhere, some time earlier. On 21st April, under circumstances that, to put it mildly, would raise grave suspicion, Sam Gross gave Cardoza the sum of \$500, while the two of them only were in the former's automobile on Front Street in the city of Toronto, and on 24th April, under likewise similar suspicious circumstances, in a restaurant, Sam Gross gave Cardoza the further sum of \$500. It was in respect of those payments that the charge was laid against the respondent. On his trial the respondent swore that those payments were a loan to Cardoza, made at Cardoza's request, and were not a "bribe", as Cardoza swore they were.

Turning now to the judgment pronounced by the learned trial judge, I extract therefrom the following:—

"The charge here is under section 504, subsection 2(b) of the Criminal Code, and the two ingredients in this subsection are consideration, the giving of consideration for a purpose, but that act must be accompanied with corruption . . . [Cardoza] was asked what he was there for and he said definitely in his evidence he was there to assist in getting an increase in prices in rubber or an increase in the subsidy on used materials. In Car-

doza's evidence, I noticed throughout, that he used the word 'bribe'. He stated that he received this bribe. However, taking his evidence on the whole, I can only come to one conclusion, and that is that he was there endeavouring to assist in getting an increase in prices.

"Now then, on April 15th, 16th or 17th, Ex. 3 [a draft of the letter to Godfrey] was revised and is now Ex. 4, and from it, it is quite apparent that Cardoza's purpose was to assist the National Rubber Company to get an increase in prices on behalf of the National Rubber Company and on behalf of the rubber trade . . . All this transpired and was done some time prior to April 17th. . . . There is no suggestion, or there is nothing to suggest, that Cardoza was doing anything improper, or had done anything improper towards advising these people as to how to obtain increases in prices in rubber or in the matter of a subsidy.

"Now Cardoza, for some reason or other, persuaded Reuben to make him an *offer*, and Reuben had done that; He had offered him one thousand dollars on the condition that he, Cardoza, signed an I.O.U. Cardoza refused to do so and this came to the attention of Samuel Gross who probably realizing that Cardoza had given him (Reuben) some valuable suggestions as to how he could get the increase, made a *loan* to him of one thousand dollars. *At all events*, from the evidence, Samuel Gross *either gave him one thousand dollars or made a loan to him of that amount*. Now where is the inducement if such are the facts? If that is what actually took place, the question of inducement disappears. . . . Nobody would say that Samuel Gross was inducing him to do what he did when he paid him the thousand dollars . . .

"I find that one thousand dollars was handed over by Samuel Gross to Cardoza, *and I have come to the conclusion that that money handed over was probably a consideration more or less for the services that Cardoza had given*. There is nothing in the nature of corruption in this case that I can see. They are not asking the Department to do anything irregular . . . I cannot find in the evidence any corruption whatsoever. It was not a matter of saying, 'I will give you so much if you do something irregular for me.' But here the question of an increase in prices is being dealt with in various commodities from day to day and representations were in support of these applications

which were being made, and I cannot see why any fault could be found in the way this matter was dealt with . . . I find that the thousand dollars was accepted by Cardoza and *if it was a loan*, as represented by Mr. Samuel Gross, of course he will feel impelled to repay the money." (The italics are mine.)

For the purposes of my judgment the foregoing extracts sufficiently state the findings of fact of the learned trial judge, and also sufficiently demonstrate the basis upon which he acquitted the accused.

Since the right of appeal of the Attorney-General is limited to questions of law, this Court is precluded from disturbing any findings of fact of the learned trial judge, even though we might disagree with them. This does not mean that this Court is precluded from inquiring into the soundness of his conclusions of mixed law and fact, such as the guilt or innocence of the accused, where such conclusions depend upon the legal effect of certain findings of fact made by the trial judge: *Belyea v. The King*; *Weinraub v. The King*, [1932] S.C.R. 279 at 296, 57 C.C.C. 318, [1932] 2 D.L.R. 88.

Before discussing the argument it is well to pay close attention to the exact wording of the section under which the accused was charged. It is as follows:—

"Everyone is guilty of an offence, and liable . . . [to the penalty therein set forth] who . . . corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward or consideration to such agent for doing or forbearing to do, or for having done or forborne to do any act relating to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person with relation to his principal's affairs or business".

I draw particular attention to that to which the inducement or reward or consideration is by the section made to relate. It is for doing or forbearing to do, or for having done or forborne to do, any act. It is also for showing or forbearing to show favour or disfavour.

Counsel for the respondent argued that it was apparent from the learned trial judge's reasons that he did not believe Cardoza, and therefore that the money which passed must have been not a gift, as Cardoza swore it was, but a loan, as sworn to by the accused. If this appeal turned on the question of fact as to whether it was a gift or a loan, I would have great difficulty

in determining what the learned trial judge concluded it was. In my judgment that distinction is not the deciding factor. A crooked and unprincipled individual might cloak what he intended as a gift with the appearance of a loan, or, as between himself as lender and the recipient as borrower, advance money to the latter and still come within s. 504(2) (b) of The Criminal Code. The motive of the "lender" could be a corrupt motive, and the making of the "loan" could be an inducement or reward or consideration within the section.

The learned trial judge did come to the conclusion "that the money handed over was probably a consideration more or less for the services that Cardoza had given", and that "there is nothing in the nature of corruption in this case". I do not know what he meant by "more or less". However, this much is plain, namely, that, subject to whatever qualifications the learned trial judge intended those words to have, he concluded that "probably"—and that word embarrasses me—the money was handed over by the respondent to Cardoza as a reward. Throughout his judgment he seems to negative the suggestion that it was handed over as an inducement, even "more or less". The evidence certainly would permit—and since it is a question of fact I refrain from saying it warranted—the conclusion that it was given as an inducement. It was the prerogative of the learned trial judge to make the finding, but in addressing himself to that question he seems to have been under the impression, erroneous in law, that the inducement had to be directed to some clearly defined specific act on the part of Cardoza. The section under which the respondent was charged is not so confined. It is aimed not only at an inducement to do or forbear from doing some specific act, but also at an inducement for showing favour or disfavour, not necessarily in relation to a specific instance or occasion, but favour or disfavour generally with relation to the principal's affairs or business.

It is manifest from those parts of the learned trial judge's reasons which I have quoted that he erred in his interpretation of the section and its scope. Had he given it a correct interpretation, and applied it in the full field of its scope, he might or might not have found the accused guilty on the basis that he gave the money, whether as a gift or as a "loan", as an inducement to show favour. That was for the trial judge to decide on a proper application of the section to the facts. He has found

as a fact that it was "more or less" by way of reward. Was it "less" by way of legal reward, and "more" for another purpose, *viz.*, a purpose forbidden by the section, or was it entirely for such illegal purpose? The question will have to be determined by a new trial.

The word "corruptly" in the section sounds the keynote to the conduct at which the section is aimed. The evil is the giving of a gift or consideration, not *bona fide* but *mala fide*, and designedly, wholly or partially, for the purpose of bringing about the effect forbidden by the section. It need not necessarily amount to a bribe to do some specific act, or a reward for having done it. The learned trial judge apparently thought that unless it did amount to a bribe the conduct was not corrupt within the meaning of the section, and, having applied that *ratio*, he misdirected himself.

In *Re Launceston Election Petition* (1874), 30 L.T. 823, Mellor J., at p. 831, referring to the meaning of the word "corruptly" in the Corrupt Practices Prevention Act in England, quotes with approval Blackburn J., as follows:—

"The word 'corruptly' means contrary to the intention of this Act, with motive or intention by means of it to produce an effect upon an election, not going so far as bribery, but going so far as to produce an effect upon the election."

So here, if the giving of the money by the respondent to Cardoza, whether a gift or a "loan", was intended by the respondent to accomplish the purpose forbidden by the section, such conduct was corrupt. Accordingly the finding of the trial judge that there was "nothing in the nature of corruption" was based on misdirection.

For the reasons stated, there must be a new trial, unless the further argument of counsel for the respondent on this appeal, which I now propose to discuss, prevails.

Counsel for the respondent argued that since Cardoza was an employee of the Commodity Prices Stabilization Corporation, and since that corporation had no jurisdiction to increase either the amount of the subsidy or the ceiling price, any gift or consideration given to him by the respondent, even if it was a gift or consideration intended by the respondent to relate to such an increase, was not anything relating to the affairs or business of Cardoza's employer.

After a careful reading of the evidence I am satisfied that that argument cannot prevail. At the trial, counsel for the respondent called Mr. Godfrey as a witness, and from his evidence it is perfectly apparent that he, as an official of the Wartime Prices and Trade Board, worked in close co-operation with Cardoza's employer for the purpose of determining whether the problems of the industry should be treated by a price increase or a subsidy. It is unnecessary for me to repeat what I have earlier stated as to the relative position of the Commodity Prices Stabilization Corporation, which was Cardoza's principal, and the Wartime Prices and Trade Board, which had exclusive jurisdiction with relation to the amount of the subsidy and the ceiling price.

The appeal should be allowed and a new trial should be ordered.

New trial ordered.

Solicitor for the Crown, appellant: John J. Robinette, Toronto.

[COURT OF APPEAL.]

LaJeffries v. Roberts.

Landlord and Tenant—Covenant Not to Assign or Sublet without Leave—Assignment, expressly Made Conditional upon Landlord's Consent—Conduct of Parties—The Short Forms of Leases Act, R.S.O. 1937, c. 159, schedule B, clause 8.

A tenant, whose lease contained a covenant that she would not assign or sublet without leave, entered into an arrangement for the sale of her business, and for the assignment of the lease of the premises in which it was carried on. A formal assignment of the lease was executed, containing an express proviso that it was made "subject to the approval and consent of the Landlord." The solicitor who acted for both the tenant and the assignee delayed applying for the landlord's consent, but the assignee took possession of the premises and the business. When the solicitor applied for consent, it was refused, and the assignment was immediately cancelled, the tenant returning into possession. The landlord then demanded possession, claiming that there had been a forfeiture by reason of the breach of covenant.

Held, the landlord was not entitled to claim a forfeiture. The real question must be whether what was to be accomplished between the tenant and the assignee was and remained conditional upon the landlord's consent and approval being obtained. The conduct of the parties indicated that, notwithstanding the change of possession, the condition still remained effective, and whatever term was applied to the transaction—"assignment", "transfer" or "setting over", it was only conditional, and therefore was ineffectual to work a forfeiture of the lease.

The Courts have, for many years, required strict proof of a breach of covenant such as a covenant not to assign or sublet without leave before permitting a lessor to exercise the right of forfeiture. To create a forfeiture the instrument of assignment must be valid and effectual in law; an equitable assignment is not enough: *Cornish v. Boles* (1914), 31 O.L.R. 505. Neither is a mere letting into possession enough when the covenant is in the terms of The Short Forms of Leases Act: *Straus Land Corporation Limited v. International Hotel Windsor Limited* (1919), 45 O.L.R. 145. Where the words of the covenant are "assign, transfer and set over", and it does not extend to an under-lease, the words quoted are mere words of assignment: *Crusoe d. Blencowe v. Bugby* (1771), 2 Wm. Bl. 766; *Grove v. Portal*, [1902] 1 Ch. 727.

AN APPEAL by a tenant from an order of Macdonell Co. Ct. J., of the County Court of the County of York, ordering the delivery up of possession of rented premises.

5th December 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and McRUER J.J.A.

J. D. Arnup, for the tenant, appellant: The trial judge held that the assignment was not sufficient to constitute a breach of covenant, but that, because the assignee had gone into possession of the premises, there had been a "setting over" of the premises within the meaning of the extended form of the covenant in The Short Forms of Leases Act, R.S.O. 1937, c. 159. He relied upon *Grossman v. Modern Theatres Limited* (1919), 45 O.L.R. 564 at 570. Such covenants must be strictly construed. Their purpose is to protect a lessor from having his premises used or occupied in an undesirable way or by an undesirable person, and not to enable the lessor to coerce a tenant to surrender the lease so that the landlord may obtain possession: *Bates v. Donaldson*, [1896] 2 Q.B. 241 at 247. To amount to a violation of the covenant, an assignment must be completely valid and effective in law; neither an equitable assignment nor a mere letting into possession is sufficient: *Cornish v. Boles* (1914), 31 O.L.R. 505 at 519, 19 D.L.R. 447; *McCallum, Hill & Co. v. Imperial Bank of Canada* (1915), 7 Sask. L.R. 333, 30 W.L.R. 343, 7 W.W.R. 981, 22 D.L.R. 203 at 206.

There is no difference in meaning between the phrase "set over" and the word "assign". The three terms, "assign", "transfer" and "set over", are all mere words of assignment, and are, in fact, synonymous: *Crusoe d. Blencowe v. Bugby* (1771), 2 Wm. Bl. 766, 96 E.R. 448; *Doe d. Pitt v. Hogg* (1824), 4 Dow. & Ry. K.B. 226 at 229, *Follis v. The Township of Albemarle et al.*, [1941] O.R. 1 at 7, [1941] 1 D.L.R. 178; Murray's New English

Dictionary, s.v. "set over". There is no foundation for the proposition that there can be a setting over apart from an assignment.

The document executed by the parties was of a conditional nature, and did not amount to an assignment sufficient to constitute a breach of covenant. The mere taking of possession is not sufficient to amount to a breach. The whole question is whether we did in fact transfer, assign and set over, and this we did not do.

L. Herman, for the landlord, respondent: It is a question of fact whether there was an assignment of the lease; on the facts of this case it should be held that there was such an assignment. There had been a change of possession before permission was obtained, and that was a breach of covenant: *Jackson v. Simons*, [1923] 1 Ch. 373 at 383.

J. D. Arnup, in reply: The respondent is here seeking to take advantage of the covenant because she wishes to regain possession. I refer to Redman's Law of Landlord and Tenant, 8th ed. 1924, pp. 391, 393.

Cur. adv. vult.

11th December 1945. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by the tenant in a proceeding between landlord and tenant under Part III of The Landlord and Tenant Act, R.S.O. 1937, c. 219, from the order of Judge Macdonell, of the County Court of the County of York, dated 11th October 1945, by which the tenant is ordered to deliver up possession of the demised premises.

A rooming-house business had been carried on in the premises in question by the former owner of the premises, and on the sale of that business to the appellant she leased to her the premises where the business was carried on, by lease dated 12th March 1945, for the term of two years. The lease is made in pursuance of The Short Forms of Leases Act, R.S.O. 1937, c. 159, and it contains a covenant that the lessee "will not assign or sub-let without leave." This short form covenant is translated by the statute into the following:

"8. And also that the lessee shall not, nor will during the said term, assign, transfer or set over or otherwise by any

act or deed procure the said premises or any of them to be assigned, transferred, set over or sub-let unto any person or persons whomsoever without the consent in writing of the lessor first had and obtained."

In July 1945 the appellant had negotiations with Mrs. Gladys Malone for the sale to the latter of the rooming-house business and the assignment to her of the lease of the premises. On the 31st July there were signed and sealed a bill of sale from the appellant to Mrs. Malone of the furniture and other goods, chattels and effects of the rooming-house business, and a chattel mortgage back from Mrs. Malone to the appellant to secure the unpaid portion of the consideration of \$2,500. At the same time the appellant signed under seal an assignment to Mrs. Malone of the unexpired residue of the term created by the lease held by the appellant of the premises now in question. This assignment of lease, after a recital stating the fact of the granting of the lease, contains the following further recital: "And whereas the said Assignor has agreed to sell and assign the said lease unto the said Assignee, subject to the approval of the Landlord." After the covenants in the assignment appears the following: "Provided that the assignment herein is made subject to the approval and consent of the Landlord."

These documents were all prepared by the solicitor who had acted in carrying through the transaction by which the appellant had acquired the rooming-house business and the lease. He acted for both the appellant and Mrs. Malone in the transaction of July, and prepared the several documents I have mentioned, and witnessed the signing of them by both parties. He says that he inserted the words I have quoted from the assignment of lease with respect to the assignment being subject to the approval of the landlord, to protect both of the parties because the assignment was conditional upon the landlord agreeing. He says that he told them this before they signed. The assignment of lease appears to have been left in his hands for the purpose of obtaining the consent in writing of the landlord.

Unknown to the solicitor or to the parties to the foregoing transaction, the appellant's lessor, by deed dated 19th July 1945 but unregistered until 1st August, had sold and conveyed the leased property to the respondent. No notice of this change of ownership was given to the appellant at the time. In the mean-

time the bill of sale and chattel mortgage covering the chattel property of the rooming-house business had been registered in the office of the Clerk of the County Court. Mrs. Malone, the purchaser, had taken possession and was carrying on the rooming-house business on the leased premises. The solicitor to whom had been left the obtaining of the landlord's consent to the assignment of the lease, had delayed applying for it, intending, according to the letter which he later wrote asking for it, to send along the necessary papers with the rent due on 15th August.

In the meantime the respondent had learned of the change of possession and had consulted her solicitor, who wrote Mrs. Malone with notice of the respondent's purchase of the property, and requiring that Mrs. Malone vacate the premises forthwith. In reply to that letter the solicitor who had acted for both parties in the sale of the rooming-house business to Mrs. Malone, wrote respondent's solicitor explaining the position and requesting the respondent's consent to the assignment of the lease and enclosing the rent for the ensuing month. The rent and the consent were both refused.

The respondent admits that there is no objection to Mrs. Malone that would have warranted withholding consent to an assignment to her as tenant, if the owner's consent had been requested before the covenant not to assign or sublet without leave had been broken. Her position is that there had been a breach of the covenant and her election to declare the lease forfeited had been exercised and possession had been demanded before any request was made for her consent.

There are numerous reported decisions upon the effect and operation of a covenant not to assign or sublet without the owner's consent, and as to what constitutes a breach of such a covenant. To create a forfeiture the instrument of assignment must be valid and effectual in law. An equitable assignment is not enough: *Cornish v. Boles* (1914), 31 O.L.R. 505 at 519, 19 D.L.R. 447; Woodfall Law of Landlord and Tenant, 24th ed. 1939, p. 585; Foa, Law of Landlord and Tenant, 5th ed. 1924, p. 318. Neither is a mere letting into possession enough where the covenant is in the terms of the covenant here: *Straus Land Corporation Limited v. International Hotel Windsor Limited* (1918), 45 O.L.R. 145, 48 D.L.R. 519, per Falconbridge C.J.K.B.

at p. 147. The learned County Judge seems to have been of the opinion that letting Mrs. Malone into possession in the circumstances present here amounted to a setting over of the premises, which is contrary to the terms of the covenant. He cited the case of *Grossman v. Modern Theatres Limited* (1919), 45 O.L.R. 564, where Rose J. (afterwards Chief Justice) expressed the opinion that, although an assignment that had been signed had not been delivered, as it was signed merely so that there might be something formal to submit to the landlord, yet putting the assignee into possession under the circumstances there present, even if there was no assignment, amounted to a "setting over" of the premises and to a breach of the covenant.

It has been held that when the words of the covenant were "assign, transfer or set over", and did not extend to an under-lease, the words "assign, transfer and set over" were mere words of assignment: *Crusoe d. Blencowe v. Bugby* (1771), 2 Wm. Bl. 766, 96 E.R. 448. This case is cited in the judgment of Joyce J. in *Grove v. Portal*, [1902] 1 Ch. 727 at 731, as well as in such text-books as Woodfall and Foa. I do not think, however, that the present case turns upon any nice question of the precise meaning of the words of the covenant. It seems to me that the real question here is whether that which the documents signed by the appellant and Mrs. Malone were designed to accomplish was conditional, and continued to be conditional, upon the consent and approval of the landlord being obtained. If there never was in reality such a condition, or it was waived or abandoned as a condition, either expressly or by conduct, then there was an effective and completed assignment. If, on the contrary, notwithstanding that Mrs. Malone entered into possession and carried on the rooming-house business, the condition still remained an effective condition, that condition applied no matter what term one may give to what was to be done—whether "assignment" or "transfer" or "setting over". It was only conditional, and, therefore, was ineffectual to work a forfeiture of the lease.

The learned County Judge says that there are virtually no facts in dispute. I do not find any express finding by him on the matter of whether the condition was inserted in the assignment of lease before it was signed, as the solicitor states, and whether the document was signed after he had explained the

purpose of the condition, but I take it that he had accepted these important statements as true. The evidence, as well as the whole probability of the matter, fully support such a finding of fact and counsel for the respondent made it plain that he did not question the solicitor's integrity in the matter.

The delay in asking for the consent seems to have been wholly chargeable to the solicitor. It was left for him to attend to. It is not likely that anyone contemplated that any difficulty would be made by the owner in giving consent. Mrs. Malone is admittedly unobjectionable as a tenant, and no good reason for withholding consent would seem to have been available to the owner, if she had been asked before she saw an opportunity to claim a forfeiture. Then the conduct of the appellant and Mrs. Malone, when a question arose, is important. They at once, and very definitely, acted in observance of the condition and cancelled their whole transaction.

It may seem to be a case where the landlord, without much merit in her complaint of a breach of covenant, is seeking to profit by a little laxity upon the part of the solicitor in charge of the transaction. It is not necessary, however, to determine whether or not that is so, for the Courts have, for many years, required strict proof of a breach of covenant of this character before permitting a landlord the right of forfeiture, and that strict proof is, in my opinion, lacking here.

I would allow the appeal and set aside the order of the County Judge. The appellant is entitled to her costs, both of this appeal and of the proceedings below.

Appeal allowed with costs throughout.

Solicitor for the landlord, respondent: Louis Herman, Toronto.

Solicitors for the tenant, appellant: Mason, Foulds, Davidson & Gale, Toronto.

[COURT OF APPEAL.]

McBride v. Appleton.

Infants—Contracts—Whether Voidable or Void—Penalties—Conditional Sale Agreement.

An infant bought a motorcycle from the plaintiff, entering into a conditional sale agreement whereby the property in the motorcycle was to remain in the plaintiff until payment in full of the purchase price. The infant resold the motorcycle before the price was fully paid, and, after intermediate sales, it came into the defendant's possession. The plaintiff claimed to be entitled to it under the agreement.

Held, (ROACH J.A. *dissenting*), the plaintiff was entitled to succeed. The contract was clearly not of that limited class which is recognized as binding upon an infant. But it was not possible, on the evidence, to say that it was manifestly prejudicial to him, to such an extent as to make it void rather than voidable. Since it was voidable only, and had not been avoided by the infant, the defendant could not set up its invalidity to defeat the plaintiff's claim.

Review of authorities.

AN APPEAL by the defendant from the judgment of Barton Co. Ct. J., of the County Court of the County of York.

10th and 11th October. The appeal was heard by GILLANDERS, LAIDLAW and ROACH JJ.A.

Thomas Delany, for the defendant, appellant: The contract between the plaintiff and Russell was not merely voidable, but wholly void. As to the general law in this respect, see *Ivan v. Hartley et al.*, [1945] O.W.N. 627, [1945] 4 D.L.R. 142. Such a contract cannot be said to be for the infant's benefit, or to be a contract for necessities, and it is therefore not one of those contracts by which an infant can be bound: *Pyett v. Lampman*, 53 O.L.R. 149, [1923] 1 D.L.R. 249. If a contract provides a penalty, it is wholly void.

The respondent, by his conduct, is estopped from denying the appellant's title: *Henderson & Co. v. Williams*, [1895] 1 Q.B. 521; *Babcock et al. v. Lawson et al.* (1879), 4 Q.B.D. 394; 4 C.E.D. (Ont.), pp. 313, 319. There are cases holding that a third person cannot plead the fact that a contract is voidable, but they do not apply where the contract is void.

When the conditional sale agreement was signed by Russell, property in the motorcycle had already passed to him, and the only way in which the plaintiff could obtain security for the balance of the price was by a chattel mortgage: *Gallant v. Mellett* (1898), 18 C.L.T. (Occ. N.) 199; *Harris v. Whitehead* (1914), 25 Man. R. 105, 30 W.L.R. 32, 7 W.W.R. 660, 19 D.L.R. 722. The plaintiff did not comply with the provisions of The

Conditional Sales Act, R.S.O. 1937, c. 182, and is therefore not entitled to assert ownership against the defendant, a subsequent *bona fide* purchaser for value without notice.

C. M. Ricketts, for the plaintiff, respondent: The question of property passing, being simply one of intention, is to be determined according to the circumstances of the transaction: *Langley v. Kahnert* (1904), 9 O.L.R. 164; Barron, Canadian Law of Conditional Sales, 3rd ed. 1928, p. 31. Barron further points out that the contract must be construed as of its true date, and upon its construction as of that date depend the rights of vendor and vendee, and it should be signed at or before delivery of the goods, or at a point in time so near to the delivery of the goods that all that is done in relation to the sale may be regarded as part of the one transaction: *Collom v. McGrath* (1904), 15 Man. R. 96. A mere declaration by the owner of a chattel that he has sold it, and one by the alleged buyer that he has bought it, falls short of an actual passing of the property in the chattel where there is no delivery of either documents or chattel to the alleged buyer: *Greaves v. Cadieux* (1916), 50 Que. S.C. 361, 33 D.L.R. 584. It does not follow that payment of the purchase money makes a transaction a sale, since if the goods are destroyed by fire, after payment of the purchase price but before they have been put into a deliverable condition, the purchaser is entitled to recover back the purchase price: *McDill v. Hilson*, 30 Man. R. 454, [1920] 2 W.W.R. 877, 53 D.L.R. 228. The facts here show that there had been no sale before execution of the conditional sale agreement.

As to the effect of such a contract when made by an infant, see 10 Can. Abr. col. 614; *McGaw v. Fisk* (1908), 38 N.B.R. 354, 4 E.L.R. 512. This contract was merely voidable, not void: 22 Can. Abr. cols. 537-8. The penalty clauses contained in it are established in law, and are not sufficient to make it wholly void.

Thomas Delany, in reply, referred to *International Accountants Society Inc. v. Montgomery*, [1935] O.W.N. 364; *United States v. Bainbridge* (1816), 1 Mas. 71; *Meakin v. Morris* (1884), 12 Q.B.D. 352; *Beam v. Beatty* (1902), 4 O.L.R. 554.

Cur. adv. vult.

12th December 1945. GILLANDERS J.A.:—The defendant appeals from a judgment of His Honour Judge Barton sitting in the County Court of the County of York.

Under the terms of a conditional sale agreement dated 27th March 1942, the respondent plaintiff, a dealer in bicycles and motorcycles, sold to a lad by the name of Russell a second-hand Harley Davidson motorcycle. In the information given and representations made in writing by Russell at the time of the purchase, appended to the agreement and signed by Russell, it is shown that at that time he was sixteen years of age. A few weeks after getting possession of it, Russell apparently exchanged this motorcycle for another with a firm other than the respondent, and represented to the firm with which he made the exchange that the motorcycle in question was fully paid for and unencumbered. He continued making some payments to the respondent under his agreement until 27th June 1942, and thereafter made no further payments, the respondent temporarily losing trace of both Russell and the motorcycle. The firm to which Russell had passed the motorcycle in question, after an intermediate sale and purchase sold it to one Spence, one of the third parties in this action. Spence in turn, through the agency of Jay, the other third party, sold it to the appellant, who is also a motorcycle dealer. The respondent's credit manager, while on other business, discovered the motorcycle in front of the appellant's premises on 30th September 1942, and made claim to it. The appellant declined to give it up. The respondent then commenced this action, in which he obtained possession of the motorcycle by replevin, and seeks a declaration that it is his property or, in the alternative, damages.

The learned County Court Judge having found for the respondent, the appellant comes to this Court seeking a reversal of that judgment.

The appellant's main contention is that the conditional sale agreement, on which the respondent relies, is invalid, and this is rested on the fact that the purchaser Russell was an infant. To quote the brief statement from 17 Halsbury, 2nd ed. 1935, p. 604: "At common law, an infant's contracts are, in general, voidable at the instance of the infant, though binding upon the other party. Exceptions to this rule are contracts for necessities, and certain other contracts such as contracts of service and apprenticeship, if they are clearly for the infant's benefit; such contracts are good and binding upon an infant. Contracts

which are obviously prejudicial to an infant are wholly void; thus a warrant of attorney or a penal bond given by an infant is void."

Looking at the contract here in question, it may be said at once that it does not fall within that class of contracts which have been held to be binding upon an infant. It is not one for necessities: *Pyett v. Lampman*, 53 O.L.R. 149, [1923] 1 D.L.R. 249; it is not one of service or apprenticeship; nor is there any evidence on which a conclusion can be founded that the contract is one clearly for the infant's benefit.

The answer to the question whether, on the evidence here, or lack of evidence, it should be viewed as voidable or void does not seem so obvious.

In England the distinction between void and voidable contracts has been affected by The Infants Relief Act, 1874, which by its terms made void many contracts which formerly were voidable only. There being no similar statute here, we rest on the common law, and English decisions on this point, affected by the statute, must be applied with caution.

"... I think that, in considering whether the contract of an infant is void or voidable, the true test at common law, irrespective of any statute, is that all instruments and acts of an infant are voidable only, except those which are necessarily to his prejudice, these last being void": *per* Masten J. in *Rex v. Rash* (1923), 53 O.L.R. 245 at 255, 41 C.C.C. 215.

Applying this test to the contract here under consideration, the question is whether or not on the evidence the Court should conclude that this contract was necessarily to the prejudice of the infant purchaser. Russell is not a party to the action and was not a witness, and evidence is lacking as to the purpose for which the motorcycle was purchased, or the use made of it. It is urged, however, that from the terms of the conditional sale agreement itself, it must be concluded that it is prejudicial to the purchaser because it imposes penalties. In *Beam v. Beatty* (1902), 4 O.L.R. 554, it was held that a bond with a penalty by an infant to indemnify against loss or damage in respect of shares in a company purchased on the faith of representations made by the infant, was void and not merely voidable. Garrow J.A., writing the judgment of the Court, after a careful examination of the authorities, says at p. 559:

"The rule itself may, perhaps, be expressed thus: that generally, all contracts of an infant are voidable, not void, but to this rule there are exceptions in which the contract is not merely voidable but void, and among these exceptions is the case of a bond with a penalty".

In *Phillips v. Greater Ottawa Development Co.* (1916), 38 O.L.R. 315, 33 D.L.R. 259, the contract was one for the purchase of land "with a forfeiture clause, under which, though he (the infant purchaser) might have paid all but the last mite, he might lose the land and all that he had paid upon it." The question there, as stated by Masten J. at p. 319, was ". . . whether the provision in the agreement in question for forfeiture of all claim on the lands and of all instalments of purchase-money theretofore paid, in case default is made in payment of any monthly instalment of purchase-price, brings this agreement within the category of exceptional cases where the contract is not merely voidable, but is wholly void." The majority of the Court, at the suit of the infant purchaser, held the contract void. Riddell J. dissented, holding that it could not be said that the payments which gave a right to immediate and continued possession and control were nothing "but a sum handed over by way of a penalty."

In the recent case of *Ivan v. Hartley et al.*, [1945] O.W.N. 627, [1945] 4 D.L.R. 142, Mr. Justice Hogg, after citing *Beam v. Beatty*, *supra*, and *Phillips v. Greater Ottawa Development Co.*, *supra*, on this point, held the chattel mortgage there in question void as against the infant plaintiff because in his view it contained certain penalties.

The conditional sale contract under which the motorcycle here in question was sold to the infant Russell, wherein the respondent is called "the renter" and the infant Russell "the hirer", contains the usual provisions of such contracts; that the title is to remain in the vendor, or renter as he is described; that certain stipulated payments shall be made; and, among other provisions in case of default in the making of the payments, it provides that the hirer will pay all costs and expenses of every kind and description by reason of such default, "and in particular but without limiting the generality of the foregoing; (1) By way of liquidated damages, interest at the rate of one percentum per month of the amount in arrears [etc.]; (2) In

case of collection of any such sum by a solicitor, ten percentum of the amount collected, as costs of such collection.”

It further provides that in certain events the full amount is to become due and payable, in which event the renter may repossess the motorcycle and resell or rehire it, “and apply the proceeds thereof on the full amount payable after deducting all expenses incurred in retaking, repairing and selling or reletting the article”.

While the contract here makes provision for the payment of various elements of loss or damage which might be suffered by the respondent in case of default, there is no provision which, in my opinion, amounts to a penalty in law. There is no provision for the forfeiture of a fixed amount on any breach, however great or small the loss to the respondent might be: *Townsend v. Rumball* (1909), 19 O.L.R. 433. The intention of the parties, as evidenced by the language used, and the circumstances of the case as a whole at the time the contract was made, does not point to a penalty, but indicates merely providing for the loss which the respondent might suffer on default: *St. Catharines Improvement Co. Limited v. Rutherford* (1914), 31 O.L.R. 574, 19 D.L.R. 662. See also the tests suggested for determining whether a sum should be viewed as a penalty or liquidated damages in 10 Halsbury, 2nd ed. 1933, pp. 142 *et seq.*

Even if the contract contains some provisions, whether by way of penalty or otherwise, which, standing by themselves, might be thought to be to the infant's prejudice, that is not necessarily conclusive. There are provisions in the agreement under consideration which by themselves might be thought to be to the disadvantage of the infant purchaser. Cozens-Hardy M.R. in *Roberts v. Gray*, [1913] 1 K.B. 520 at 526, in discussing *Clements v. London and North Western Railway Company*, [1894] 2 Q.B. 482, says:

“The Court considered the contract as a whole. It is quite idle to say ‘look at the contract and see if there is one clause which is adverse to the infant’.”

Viewing this contract as a whole, I am unable on the evidence before the Court to conclude that it was “necessarily to the prejudice” of the infant purchaser. In case of repossession and resale of the motorcycle, the purchaser would in law be entitled to any excess remaining after the payment of the balance of

the purchase price and the vendor's loss: *C. C. Motor Sales Ltd. v. Chan*, [1926] S.C.R. 485, [1926] 3 D.L.R. 712; *Re Stanley & Bunting*, 26 O.W.N. 452, [1924] 3 D.L.R. 599, 5 C.B.R. 18. I do not view any provisions of the agreement which by themselves might be thought prejudicial to the infant to be so vital that when viewed as part of the whole agreement one can say "this contract is necessarily to the prejudice of the infant purchaser."

In this view the agreement here is voidable only. If this conclusion is correct I think it provides an effective answer to the appellant's claim here. The infant purchaser is not a party to this action. He is not the person here seeking to protect himself by raising the plea of infancy, which, while it might be available to him, is, I think, available only to him (or his heirs, executors or administrators) and is not available to the appellant.

As stated in *Parks v. Maybee* (1851), 2 U.C.C.P. 257 at 264: "The privilege of avoiding that which is not void but only voidable, as this contract clearly was, is said to be a personal privilege, of which no one can take advantage but the infant."

In *Grey v. Cooper* (1782), 3 Doug. K.B. 65, 99 E.R. 541, it was held that the infancy of the payee was no answer in an action by the endorsee of a bill of exchange against the drawer. Lord Mansfield said: "The privilege of an infant is personal, and there is no question here as between the infant and another person."

Taylor v. Croker (1803), 4 Esp. 187, 170 E.R. 686, was an action brought against the acceptor of a bill of exchange by the endorsee. It was held no defence to plead that the drawers, who had drawn the bill payable to themselves, and of course endorsed it, were infants when the bill was drawn. Lord Ellenborough said: "If this action was against the drawers themselves, that might be a good defence; as in that case the drawers, who are stated to be infants, would be before the Court, and claiming the protection which the law affords them. But though the plaintiff derives title under them, the note is not to be considered as void in his hands."

If I am right in the view that it is not open to the appellants here to plead the infancy of Russell and claim the benefit therefrom which he might claim, it seems unnecessary to discuss the other points argued, other than to note that there was some

argument directed to the point that, in any event, the respondent had no lien on the motorcycle in the hands of the appellant because the provisions of The Conditional Sales Act, R.S.O. 1937, c. 182, had not been followed. At the time of the sale to Russell the appellant did not file the conditional sale agreement in question in the office of the Clerk of the County Court in pursuance of s. 2(1)(b) of the Act, but the trial judge has found as a fact that at the time of delivery to Russell the appellant's name and address were stamped in a conspicuous place on the upper part of the front mudguard of the motorcycle in compliance with the provisions of s. 2(5) of the statute. At some later time the mudguard had been painted over and the respondent's stamp covered, but I agree with the trial judge that this would not affect the lien. On this point he cites *Wettlaufer v. Scott* (1893), 20 O.A.R. 652, and *Canadian Westinghouse v. Murray Shoe Co.* (1914), 31 O.L.R. 11, 20 D.L.R. 672.

In the result the appeal should be dismissed with costs.

LAIDLAW J.A.:—The defendant appeals from a judgment in the County Court of the County of York delivered by His Honour Judge Barton on the 23rd day of February 1945 whereby, *inter alia*, it was declared that the respondent is the owner of a Harley Davidson motorcycle No. 33 VLE 1560 and as such is entitled to possession thereof against the appellant.

On 5th January 1942 the respondent orally agreed to sell the motorcycle to Walter J. Russell, but he did not deliver possession of it on that day. On 27th March 1942 a printed form of agreement was signed by Russell. The clauses therein provide, *inter alia*, that until full payment together with interest, costs and expenses, if any, the property in and title to the article shall remain in the respondent; that in the event of default in payment and in certain specified events the respondent may retake possession of the article; that the respondent may thereafter sell or relet to hire and apply the proceeds on the amount payable to him; that Russell waives and releases any rights to damages and agrees to indemnify the respondent against any claim or loss in certain events; that Russell will not transfer any interest in the motorcycle or assign any rights under the agreement without the consent in writing of the respondent.

On the back of the form there was a list containing information furnished by Russell including an item showing his "Age last Birthday and date of birthday—16, June 7/41". A certificate below the list and signed by Russell showed that the motorcycle was delivered to him on the representations made by him.

On the same date the document was signed, 27th March 1942 the motorcycle was registered in the Department of Highways at Toronto in the name of Walter J. Russell and a motorcycle permit No. 1661 for the year 1942 was issued to him. The form of application for 1942 registration of the motorcycle is dated 24th March 1942, and contains on the back thereof the following:

"Application for Transfer

"We hereby give notice of the change of ownership of the vehicle described hereon and make application for the transfer of Permit No. _____

From signature of Registered Owner

P. A. McBride."

After the document was signed the respondent delivered possession of the motorcycle to Russell. Subsequently Russell made default in payments, and without the knowledge or consent of the respondent disposed of the motorcycle to Rogers Road Auto Body. It was then the subject of a number of transactions until it came into the possession of the appellant by purchase from one Louis Spence. The respondent discovered it in the appellant's possession and recovered it after proceedings by way of replevin.

The respondent maintains that he is the owner of the motorcycle and as such entitled to retain possession of it as against the appellant. In the statement of claim it appears that he bases his case upon the provisions of the document signed by Russell, and upon the provisions of The Conditional Sales Act, R.S.O. 1937, c. 182. In particular he relies on the fact, as found by the learned trial judge, that at the time possession of the motorcycle was delivered by him to Russell it had "the name and address of the seller or lender . . . stamped . . . thereon" as provided by s. 2(5) of The Conditional Sales Act, *supra*, and contends that possession was delivered to the purchaser ". . . in pursuance of a contract which provides that the ownership

is to remain in the seller or lender for hire until payment of the purchase or consideration money": s. 2(1), The Conditional Sales Act, *supra*.

Counsel for the appellant argues: (1) that a sale of the motorcycle was made on 5th January 1942, and the property in it then passed to Russell, (2) that the agreement for sale as contained in the document dated 27th March 1942 is void; that the respondent cannot rely thereon and in consequence is not entitled to the benefits of The Conditional Sales Act, *supra*; (3) that the respondent is precluded from denying Russell's authority to sell the motorcycle.

Counsel for the respondent contends that there was no sale on 5th January 1942, and that the bargain between the parties is set forth in the agreement for sale dated 27th March 1942; that such agreement is valid or, in any event, voidable only; that the appellant, in defence to the claim made in the action, cannot rely upon the infancy of Russell or plead that the agreement is voidable; that the respondent is entitled to the benefits of The Conditional Sales Act; and that he is not estopped in law from showing that the property in the motorcycle did not pass from him to Russell.

I dispose at once of the argument that there was a sale of the motorcycle by the respondent to Russell on 5th January 1942. It is plain to me that there was no such sale. Both of the parties intended that a written or printed form of agreement would be subsequently prepared and executed by Russell; that procedure was followed; the form as signed by Russell expressly provides that the contents thereof "shall constitute the entire contract between the Hirer and the Renter, and no alteration, whether by way of addition or substitution herefrom shall be binding on the parties hereto unless the same be endorsed hereon in writing and signed by both parties." The terms and conditions upon which Russell obtained possession of the motorcycle, and upon which the respondent agreed to sell it to him, are clearly and completely set forth in the document. The Court cannot properly consider any other evidence tending to show a sale or agreement for sale or the terms or conditions thereof.

It will be observed at once that two major questions arise: First, into what class does this agreement to sell properly fall?

Second, can the appellant set up by way of defence that the agreement to sell is (a) void or (b) voidable?

The contract of an infant is considered in law as different from the contracts of other persons. The law exercises, as it were, a guardianship of the infant, using its power in some cases to nullify completely contractual transactions with an infant, and in other cases giving the privilege to the infant of saying during his infancy, and for a reasonable time thereafter, that he will not be bound by a contract to which he is a party.

The general rule is that an infant is not, except in certain cases, liable on contracts made by him: *Cowern v. Nield*, [1912] 2 K.B. 419 at 424, approved in *Mercantile Union Guarantee Corporation Limited v. Ball*, [1937] 2 K.B. 498 at 502. The cases falling within the exception are stated in Coke upon Littleton, p. 172a, as follows: “. . . an infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards”. In the course of years there have been additions made to the above enumeration. Contracts for service of apprenticeship, or analogous to these, entered into by an infant, and held by the Courts to be for his benefit, are binding upon him: *Fellows v. Wood* (1888), 59 L.T. 513; *Evans v. Ware*, [1892] 3 Ch. 502; *Clements v. London and North Western Railway Company*, [1894] 2 Q.B. 482; *Morrison, Fleet and Co. (Limited) v. Fletcher otherwise Futchet* (1900), 17 T.L.R. 95; *Mackinley v. Bathurst* (1919), 36 T.L.R. 31; *Doyle v. White City Stadium Limited*, [1935] 1 K.B. 110. Also contracts relating to marriage settlements have been held to be binding on an infant. But it has been said, *per Slesser L.J.* in *Doyle v. White City Stadium Ltd.*, *supra*, at p. 130: “I would like to associate myself with what has been said by Kay L.J. in *Clements v. London & North Western Ry. Co.* to the effect that it is doubtful whether there is a general principle that if an agreement be for the benefit of the infant it shall bind him.” Slesser L.J. concludes, at p. 131: “. . . I am not prepared here to say that there is any general principle that all agreements for the benefit of an infant will necessarily bind him.” In *Mercantile Union Guarantee Corporation Limited v. Ball*, *supra*, it appears that an infant carrying on business as a haulage contractor entered into a hire purchase

agreement for the purchase of a motor lorry. He was unable to keep up the instalments, and in an action to recover the arrears the defendant pleaded infancy. Finlay J., at p. 502 (reading the judgment of the Court), discusses the principle and, after referring to certain cases mentioned above, concludes: "Applying the law laid down in these cases it seems to us in the first place that this contract is not one of the class by which an infant can be bound. It is not a contract for necessities within the enumeration of Lord Coke. Nor is it a contract of service or apprenticeship or analogous to any of these." It is my conclusion, based upon these authorities, that the agreement under consideration is not within the class binding on Russell, and, moreover, it could not in any event be held that it was a contract for his benefit.

Then, is it void or merely voidable? In *Keane v. Boycott* (1795), 2 Hy. Bl. 511, 126 E.R. 676, Eyre C.J. lays it down that an infant may bind himself even by deed for those things which are necessary, and that the Court only makes void such contracts as it can pronounce to be to his prejudice. In *Cooper v. Simmons* (1862), 7 H. & N. 707 at 719, 158 E.R. 654, Martin B. refers to the judgment in *Keane v. Boycott*, *supra*, and quotes a note to the 8th edition of Sheppard's Touchstone, p. 56, as follows, "Deeds or contracts made by an infant from which no apparent benefit can arise to him, are considered as absolutely void. But such as he may derive a benefit from are only voidable." Wilde B., at p. 721, says "I agree with my brother Martin that a contract is binding on an infant unless it is manifestly to his prejudice, or at least so plainly so that the Court can say that it is to his prejudice; it is then not voidable only, but absolutely void." It will be observed that the contract under consideration in that case was contained in an indenture of apprenticeship.

The test by which a contract with an infant can be held void appears in *Corn et al. v. Matthews et al.*, [1893] 1 Q.B. 310. Lord Esher M.R., at p. 314, says, in discussion of the rule laid down by Fry L.J. in *De Francesco v. Barnum* (1890), 45 Ch. D. 430: "The mere fact of some conditions in the deed being against the apprentice does not enable the Court on that ground only to say that the agreement is void. It is impossible to frame a deed, as between a master and an apprentice, in which some of the stipulations are not in favour of the one and some in

favour of the other. But if we find a stipulation in the deed which is of such a kind that it makes the whole contract an unfair one, then that makes the whole contract void. The stipulation which is objected to must be so unfair that it makes the whole contract as between the apprentice, or the infant and the master, an unfair one to the infant." A. L. Smith L.J., at p. 316, says: ". . . if there be a stipulation in the contract entered into by an infant so much to the detriment of the infant as to render it unfair that the infant should be bound by it, then the deed cannot be enforced at all." In *Flower v. London and North Western Railway Company*, [1894] 2 Q.B. 65, Lord Esher M.R., at p. 67, says the question is whether the agreement ". . . is so far prejudicial to the infant as to be unfair to and therefore not binding upon him." Again, at p. 68, A. L. Smith L.J. states that the question is whether the agreement, "taken as a whole, is so much to the detriment of the infant as to render it unfair that he should be bound by it. That question is for the judge to determine, when he has got any facts found which may be necessary for its determination."

In *Green v. Thompson*, [1899] 2 Q.B. 1, Darling J., at p. 5, expresses the view that the true rule is laid down by A. L. Smith L.J. in *Corn et al. v. Matthews et al.*, *supra*. Channell J., at p. 6, refers to the same authority and states, "You may find in any contract a clause which by itself is not to the advantage of the infant; but that is not enough; the contract as a whole must be disadvantageous." See *Clements v. London and North Western Railway*, *supra* at p. 495; also *Morrison, Fleet and Co. (Limited) v. Fletcher*, *supra*, at p. 96, in which case the contract under consideration contained a clause to the effect that an infant was not to carry on the business of his master "under a penalty of £200 to be recovered as and by way of liquidated damages and not by way of penalty." It was held that the clause as to the payment of the £200 was not a penalty clause in the ordinary sense, and only bound the infant to pay the damage actually caused by his breach of contract. The President (Sir F. Jeune) stated: "The agreement was a perfectly fair and ordinary agreement and it did not work any hardship upon the infant, and the Court did not think it could be said that that penalty clause was bad enough to vitiate the whole agreement." In *Doyle v. White City Stadium Limited*, *supra*,

Romer L.J., at p. 138, again makes it plain that "in considering whether any particular contract is detrimental to the interests of the infant the Court has to look at the contract as a whole". The Court was referred to the cases of *Beam v. Beatty* (1902), 4 O.L.R. 554 and *Ivan v. Hartley et al.*, [1945] O.W.N. 627, [1945] 4 D.L.R. 142. I do not consider the judgments in these cases to be in conflict with the rule as I understand it to be. In both cases the contract in question was, necessarily, to the prejudice of the infant. I have also read and considered the learned judgment of Rose J. in *Rex v. Rash* (1923), 53 O.L.R. 245 at 255, 41 C.C.C. 215.

Now, applying the principle and rule as laid down in the above cases, I examine the agreement in question to determine whether, on the facts which may be found from the evidence, it can be held that, taken as a whole, the agreement to sell is so much to the detriment of Russell, the infant, as to render it unfair that he should be bound by it. It does not appear in evidence that the terms and conditions contained in the agreement are unusual. On the contrary, it may properly be found that they are the ordinary terms and conditions under which such a transaction is entered into. It is urged that the provision that the hirer, the respondent, may retake possession of the motor-cycle in certain specified events is a penalty clause which makes the agreement void. I do not agree. That clause does not make the whole agreement detrimental to the infant, nor make it so disadvantageous to him as to render it unfair that the contract should be enforced against him. It may be observed too that s. 7(1) of The Conditional Sales Act imposes a duty upon the seller (or lender) after retaking, and protects the purchaser (or hirer) by a statutory right to redeem the goods. Finally, it is to be noted that the infant Russell is not a party to the present proceedings. In the circumstances, I am of the opinion that there is not sufficient evidence from which facts may be found to enable the Court to hold that the agreement is void within the principle and rule as above discussed. It follows that, in my opinion, the agreement in question is one that is voidable only at the election of the infant Russell.

The second question may be now considered, *viz.*, can the appellant set up by way of defence that the agreement of sale is (a) void, or (b) voidable? Because of my view that the agree-

ment is voidable only, and not void, I need not discuss at length the position of the appellant in the former case. I merely mention that the plea that an agreement was void under certain statutes has been raised and given effect to by the Court. See *Sykes v. Dixon* (1839), 9 A. & E. 693, 112 E.R. 1374; *Cox v. Muncey* (1859), 6 C.B. N.S. 375, 141 E.R. 502.

But if a contract made with an infant be voidable, the privilege of avoiding it belongs to the infant only. Holt C.J. in *Coan v. Bowles et al.* (1689), Carth. 122, 90 E.R. 1097, says ". . . infancy is a personal privilege, of which none can take benefit but he himself." See also *Keane v. Boycott*, *supra*. In *Parks v. Maybee* (1851), 2 U.C.C.P. 257 at 264, Macaulay C.J. states: "The privilege of avoiding that which is not void but only voidable, as this contract clearly was, is said to be a personal privilege, of which no one can take advantage but the infant".

On these authorities I rest my opinion that the appellant cannot plead the infancy of Russell, or that the agreement made between him and the respondent was voidable.

It remains to mention the argument that the respondent is estopped in law from denying the authority of Russell to sell the motorcycle. This argument must fail. The respondent did not put Russell in a position of authority to sell the motorcycle and transfer ownership of it to an innocent person. On the contrary he complied with the requirements of The Conditional Sales Act by having his name and address stamped on the article at the time he gave possession of it to Russell. He did all that was necessary to give him the benefit and protection of the statute, and nothing which would deprive him of it. Russell could not be deemed the owner of it, and the respondent is not in my opinion precluded from claiming that the property in the motorcycle remained in him at all times.

I am therefore of the opinion that the appeal fails on all grounds and ought to be dismissed with costs.

ROACH J.A. (*dissenting*):—At the threshold of this appeal, a question of law arises, namely, whether a contract made between the respondent and one Russell, an infant sixteen years of age, covering the conditional sale by the former to the latter of a motorcycle, was void or voidable. Depending upon the class into which the contract falls, different considerations apply.

No one suggests, and it certainly could not be successfully argued, that it is a valid contract, that is, one enforceable against the infant during infancy. It must, therefore, be either void or voidable.

In *Beam v. Beatty* (1902), 4 O.L.R. 554, Garrow J.A. states the rule as being “. . . that generally, all contracts of an infant are voidable, not void, but to this rule there are exceptions in which the contract is not merely voidable but void, and among these exceptions is the case of a bond with a penalty, and again another class of exceptions in which the contract is neither voidable nor void, but valid and binding on the infant, such as simple contracts respecting necessities.”

Let us, therefore, examine the contract and see what are its terms and conditions, and for what it provides.

By it, the respondent, therein described as the “renter”, hires the motorcycle to the infant, therein described as the “hirer”, on, *inter alia*, the following terms and conditions: The hirer has paid in cash \$95 and agrees to pay the renter the further sum of \$4 each and every week as a weekly rent until a further sum of \$207.10 has been paid, and each of the weekly payments is represented by a promissory note. Until the full payment of \$302.10, together with interest, costs and expenses, if any, the property in and title to the article shall remain in the renter. “In the event of default in payment of any of the sums to become due weekly, the hirer . . . agrees to pay the renter all costs and expenses of every nature, kind or description whatsoever which may or do arise or accrue to the renter by reason of such default, and in particular without limiting the generality of the foregoing; (1) by way of liquidated damages, interest at the rate of one percentum per month on the amount in arrears . . . (with a minimum charge of 50c per month); and (2) In case of collection of any such sum by a solicitor, ten percentum of the amount collected as costs of such collection.”

In the event of default in payment of any money to become payable or of a bankruptcy, insolvency or receiver proceedings being instituted against the hirer or his property “or of the article being confiscated or misused or being in danger of misuse or confiscation (of which the renter shall be the sole judge) or in the event of failure to comply with any condition of this agreement, the full amount shall, at the election of

the renter (notice of which election is hereby waived by the hirer) be immediately due and payable.”

“In the event of the full amount becoming payable as aforesaid, the renter, or his agent, may, without process of law, retake possession of the article, together with any part or parts which may be connected therewith or attached thereto . . . without demand and for this purpose to enter any of the hirer’s premises or wherever the hirer has placed said article to search for and obtain said article and to remove the same therefrom, using such force as may be necessary for so doing.”

“The hirer hereby waives and releases any right of action for damages or otherwise, which he might otherwise have against the renter or his agent or agents by reason of his or their retaking or attempting to retake possession as aforesaid, and agrees to indemnify the renter against any claim or loss arising therefrom.”

Now what will make a contract, otherwise merely voidable on account of infancy, void? The rule is well settled that if the contract is manifestly prejudicial to the infant, it is not merely voidable but void.

It was argued by counsel for the appellant that this contract contains penalties to be imposed in the case of default in payment by the infant, and therefore that it is void, and by penalties counsel meant some monetary consideration over and above the amount of the unpaid balance. I cannot agree with that contention. I consider that the effect of the relevant clauses in that connection is to impose on the infant, in the event of default, not any penalty but merely damages by reason of the breach.

In *Brown v. Walsh* (1919), 45 O.L.R. 646, it is said that “The measure of damages for breaches of contract is the loss directly and naturally resulting, in the ordinary course of events, from the breach.” I think that under the terms of the contract here in question anything to which the vendor becomes entitled in the event of default, over and above the balance unpaid, can be fairly said to come within that measure.

There is, however, the provision in the contract by which the hirer waives and releases any right of action for damages or otherwise, and which I have earlier quoted. Certainly, in my

opinion, that provision is definitely prejudicial to the infant and one not binding upon him.

Oliver v. Woodroffe (1839), 4 M. & W. 650, 150 E.R. 1581, was a case in which a minor was sued for the price of necessities supplied to him. The minor gave a *cognovit* authorizing an attorney to appear for him and confess the action with an undertaking "not to bring any writ of error, nor do any act to prevent the plaintiff from entering up judgment or suing out execution." The *cognovit* being later attacked, it was held bad on three grounds, the third of which was stated by Lord Abinger C.B. as follows: ". . . the general principle of law is, that a minor is not to be allowed to do anything to prejudice himself or his rights, which he here does by undertaking not to bring a writ of error. If there had been no stipulation in this *cognovit* to deprive him of the benefit of a writ of error, he might afterwards defeat these proceedings by alleging his minority as error in fact."

In *Overton v. Banister* (1844), 3 Hare 503, 67 E.R. 479, infants *cestuis que trust* had executed a release to the trustees of all claims, the infants having received from the trustees not the whole of the trust fund to which they were entitled, but only part thereof. In the action they sought to recover the balance and the release was pleaded in bar. It was held that while the release would have been a bar at law if given by an adult, having been given by the infants it was "worth nothing in law".

It must be borne in mind that the contract here in question is a conditional sale contract. The very essence of such a contract consists in the fact that the property in the chattel is to remain in the vendor until the whole purchase price shall have been paid, with the right in the vendor to repossess the chattel in the event of default. In the event of default in a payment which has fallen due by mere lapse of time, and of the vendor repossessing by reason thereof, it is difficult to imagine any damage for which the vendor might be liable except perhaps damages for an excess of force in retaking possession. But here the full balance may become due if the article is "misused" or "in danger of misuse" and of that fact "the renter shall be the sole judge". The renter being "the sole judge", he may elect to declare the full balance due, and by the contract notice of such election is waived by the hirer, and,

“without demand”, the renter may “enter any of the hirer’s premises or wherever the hirer has placed said article to search for and obtain said article and remove the same therefrom, using such force as may be necessary for so doing.” Thus, if perchance the motorcycle should be housed in premises rented by the hirer, and the renter uses force to recover it therefrom, the hirer by this contract “agrees to indemnify the renter against any claim or loss arising therefrom”. Surely this last-quoted provision is in the nature of a bond against liability under which the hirer cannot protect himself.

In *Flower v. London and North Western Railway Company*, [1894] 2 Q.B. 65, the plaintiff had entered into an agreement with the defendant in which he agreed that neither he nor his executors or administrators or relatives should have any claim against the railway company by reason of any accident, etc. which might happen to him while upon its railway, including an accident, etc., caused by the negligence of the company, its servants or agents, and to indemnify the company against all loss, costs, damages and expenses which it might incur by reason of such accident, etc., or by reason of any claim or legal proceedings instituted or taken by him or them against the company or any of its officers or servants in respect thereof. On an appeal by the defendant from a verdict in favour of the plaintiff for damages, the Court, without calling on counsel for the plaintiffs, dismissed the appeal, holding that the agreement was so far prejudicial to the infant as not to be binding on him.

Then, do the provisions with respect to the waiver and release of any right of action for damages and for indemnification of the renter, which I have quoted, render the whole contract void?

In *Corn et al. v. Matthews et al.*, [1893] 1 Q.B. 310, the contract in question was an apprenticeship deed which contained a provision that the masters should not be liable to pay wages to the apprentice so long as the master’s business should be interrupted or impeded by or in consequence of any turn-out, but during such intervals the apprentice might employ himself elsewhere, but until employed elsewhere the apprentice had to serve his masters without wages. Lord Esher M.R., in discussing the rule laid down by Fry L.J. in *De Francesco v. Barnum* (1890), 45 Ch. D. 430, puts it thus:

"The mere fact of some conditions in the deed being against the apprentice does not enable the Court on that ground only to say that the agreement is void. It is impossible to frame a deed, as between a master and an apprentice, in which some of the stipulations are not in favour of the one and some in favour of the other. But if we find a stipulation in the deed which is of such a kind that it makes the whole contract an unfair one, then that makes the whole contract void."

It was held by all the members of the Court that the contract, taken as a whole, was so unfair that it was void. All the members of the Court applied the same *ratio*, namely that although by the contract the master had undertaken to pay wages, the provision in question enabled him to escape the obligation by the expedient of a lock-out. Lindley L.J. put it thus:

"If the proviso were addressed to a state of things over which the master might have no control, such as a strike, I think the case would not be so clear; but in this case the master has it in his own power to call in aid that proviso to the detriment of the apprentice, and if for any reason the master locks out his men the apprentice can no longer earn wages."

Here the respondent, by the terms of this contract, has it in his power to declare the whole balance due by the simple expedient of stating that in his opinion the motorcycle is in danger of misuse, and as to that the respondent is "the sole judge".

This sixteen-year old boy, at the time of the purchase, as appears from information given by him and endorsed on the back of the contract, was employed, and it is reasonable to assume that the weekly payments would come out of his weekly earnings, so that if the renter misjudged a state of facts and calculated that the motorcycle was in danger of misuse or was being misused, and repossessed the same, it is highly improbable that this sixteen-year old boy would be in a financial position to redeem it by paying the full balance then unpaid, nor would he have any recourse, even though it could be demonstrated that the respondent's statement that the motorcycle was being misused or in danger of misuse was wrong.

In *Clements v. London and North Western Railway Company*, [1894] 2 Q.B. 482, the infant plaintiff entered into the service of the defendant and agreed to become a member and be bound

by the rules of an insurance society formed among the employees of the company, and towards the funds of which the company contributed. At the same time he signed an agreement by which he accepted the contribution and the advantages to which he might be entitled under the rules of the society in lieu of any claims against the defendant under the Employer's Liability Act. It was held that the contract was a contract in respect of service and was for the benefit of the infant and therefore an answer to the claim which he made in the action. Lord Esher M.R., at p. 490, said:

"Some disadvantages to the infant have been pointed out in the contract; but it does not prevent the contract being for the advantage of the infant that it contains some things that are not to his advantage. If upon consideration of the whole agreement there is a manifest advantage to the infant, he cannot avoid it."

In determining whether the contract here in question is void or voidable, the contract must be looked at as a whole to determine whether as a whole it is or is not manifestly prejudicial to the infant.

I have reached the conclusion that the contract as a whole is void, and not merely voidable. It may seem like a contradiction to say that this result follows from certain provisions only therein contained, namely, those which I have been discussing, but having regard to the very nature of the contract the right to repossession goes to the very root of it. It is, of course, well settled that if an agreement contains portions which are void and portions which are valid, the agreement is valid as to the valid portions if they are severable from those which are invalid. That rule is often more easily enunciated than applied. How can this agreement, so to speak, be put through a juridical sieve, and the parts which are invalid because they are prejudicial to the infant be screened out from the balance? The exercise of the precise power which the respondent here seeks to invoke, namely, the power to repossess, has attached to it the immunity from damages which the contract purports to give the respondent, and which the infant could not confer. In my opinion it is impossible to separate the one from the other, and it is no answer to say that in the circumstances here existing the hirer could not have any damages by reason of the repossession by the renter.

Some time after the infant obtained possession of the motorcycle, he disposed of it to another firm, representing that it was fully paid for and unencumbered, and by a series of transactions it finally came into the possession of the appellant, and the issue here is whether or not, as against the respondent, the appellant is entitled to the motorcycle. We are thus concerned with the rights of third parties and not with the rights of the parties to the contract *inter se*.

It was argued by counsel for the respondent that it was not open to the appellant to take advantage of the infancy because such a plea is personal to the infant. It is well settled that in the case of contracts which, on account of infancy, are voidable only, the infant alone and not a third party can rely on the infancy. In *Keane v. Boycott* (1795), 2 Hy. Bl. 511, 126 E.R. 676, the Court decided that the contract there in question was voidable and not void and that the right to affirm or disavow was personal to the infant. That case is cited in Eversley on Domestic Relations 5th ed. 1937, at p. 667, as authority for the proposition that "a third person not a party to the contract cannot take advantage of the infancy of one of the contracting parties to avoid it, unless it be void in its inception". In the case of a contract which is voidable only, the infant may, on attaining his majority, elect to affirm it and be bound thereby, or even during his infancy elect to disavow it so that ratification or disavowal is something personal to the infant, but a contract which is void *ab initio* cannot at any time be ratified, so that a third party in pleading that a contract is void on account of infancy and not merely voidable, is not usurping a privilege which extends to the infant alone.

The plaintiff having founded his claim on the contract, once it is determined that the contract is void, his action against the defendant, who is a "third person", and not a party to that contract, must, for the reasons hereinafter stated, fail. From that point forward the question of infancy, in my opinion, can be ignored.

The respondent allowed Russell to have possession of the motorcycle. In addition he signed an application for a transfer of the motorcycle permit to Russell in the following terms: "We hereby give notice of the change of ownership of the vehicle described herein and make application for transfer of

permit." He filled out the questionnaire which Russell had to sign before the licence would be transferred to him as the new owner, and had Russell sign it. He thus gave to Russell not only possession, but all the insignia of apparent title. The conditional sales contract was not registered under The Conditional Sales Act, the vendor, respondent, relying upon the fact that his name was painted on the motorcycle. There is evidence that when the motorcycle came into the possession of the appellant that name had been painted over, so that the appellant was an innocent purchaser for value without notice.

In *Commonwealth Trust, Limited v. Akotey*, [1926] A.C. 72, Lord Shaw, at p. 76, says: "To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed". See also *Henderson & Co. v. Williams*, [1895] 1 Q.B. 521.

I would therefore hold that the respondent is estopped from claiming ownership and possession as against the appellant.

For the foregoing reasons I would allow the appeal and direct that judgment should be entered dismissing the plaintiff's claim against the defendant with costs. The appellant should also have his costs on the appeal. In the court below judgment was given in favour of the appellant against a third party in the proceedings, one Spence, the vendor to the appellant, in the sum of \$150 and interest and for the costs adjudged to be paid by the defendant to the plaintiff, and also the costs of the defendant's third party proceedings. Obviously the defendant, if he retains the motorcycle, cannot have judgment against the third party, and judgment should be accordingly entered dismissing the defendant's claim for relief over against the third party.

Appeal dismissed with costs, ROACH J.A. dissenting.

Solicitors for the plaintiff, respondent: Lang, Michener and Ricketts, Toronto.

Solicitor for the defendant, appellant: Thomas Delany, Toronto.

[COURT OF APPEAL.]

Tomlinson Construction Company Limited v. The City of Toronto.

Taxation—Municipal Income Assessment—Income of Company Not Derived from Business in Respect of which Business Assessment Made—Formation of Company for Special Undertaking—The Assessment Act, R.S.O. 1937, c. 272, ss. 8, 9(1)(b).

The appellant company carried on the business of a general contractor. Having been the successful tenderer for a construction contract, it entered into an agreement (carrying out a previous understanding between the parties) with two other companies, whereby, after reciting the parties' agreement that the work should be prosecuted by joint effort, it was agreed that the construction work should be done by another company, T & B, to which the contract would be assigned, and which the parties to the agreement would control. The agreement provided that each party should contribute part of the necessary capital and of the equipment required for the work, and that they should have equal share-holdings and representation on the board of directors of T & B, the consideration for the shares to be issued to be the working capital supplied and services rendered. Except in one instance, no provision was made for assuming liability for any debts or obligations that T & B might incur in the execution of the work. The construction contract was duly completed, and the profits were divided in the form of a dividend.

Held, the dividend received by the appellant company was assessable under s. 9(1)(b) of The Assessment Act as income not derived from the business in respect of which the company was assessed for business assessment. On a true construction of the agreement, it could not be said either that there had been a partnership between the appellant and the other companies, or that the parties had constituted T & B their agent for the purpose of carrying out the construction contract. Reading the agreement as a whole, it must be said that the contract was assigned to T & B with the intention that the carrying out of that contract should be its business.

It is not necessarily conclusive, on a stated case under the Act, to say that there has been an express finding by the County Court Judge that the income in question is income not derived from the business in respect of which business assessment is made. This may be solely a question of fact, as in *Re The City of Toronto and The Famous Players Canadian Corporation Ltd.*, [1935] O.R. 314, affirmed [1936] S.C.R. 141, but circumstances may exist in which the finding involves a question of law as well, as in *The City of Toronto v. Rogers-Majestic Corporation Limited*, [1943] O.R. 1, affirmed [1943] S.C.R. 440.

AN APPEAL by way of stated case from the judgment of Macdonell Co. Ct. J., confirming an assessment for income tax under s. 9(1)(b) of The Assessment Act, R.S.O. 1937, c. 272.

29th October 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and ROACH JJ.A.

G. A. Gale, for the appellant: This case is distinguishable from others that have been decided on similar questions, in that here there was a single transaction, which we say was carried on by us through Tomlinson and Brodricks Limited as our agent. Tomlinson and Brodricks Limited was a mere instrument,

and the income we received through it was derived from the business carried on by us.

We had the Hydro contract, but could not carry it out without more equipment, and we made this arrangement as a means of getting the additional equipment we needed, instead of renting or buying it. [GILLANDERS J.A.: But the agreement recites that the tender was made by both the appellant and the Brodrick companies, in the name of the appellant.] That is not set out as a fact in the stated case, and it does not affect our position.

We clearly had power to enter into such an agreement under our letters patent.

The agreement disposes completely of the destiny of Tomlinson and Brodricks Limited, although that company is not a party to the agreement. [ROBERTSON C.J.O.: Your point is that the appellant could have formed its own company to carry out this contract as its agent, and that it also had power to enter into a partnership for the undertaking with the Brodrick companies, and that what it did, in effect, was to turn over this contract to Tomlinson and Brodricks Limited, but to keep complete control itself?] Yes, and that Tomlinson and Brodricks Limited was to be a mere conduit, through which the profits flowed back to the two original companies. It had no actual interest in the Hydro contract, except to carry out the scheme agreed upon by the other companies. [GILLANDERS J.A.: Did Tomlinson and Brodricks Limited own any of the equipment?] None at all; it had no assets and no capital. [ROBERTSON C.J.O.: It had the Hydro contract, after the assignment.] The appellant transferred only its rights and benefits under that contract. Nothing is said in the stated case about liabilities. The appellant remained liable to the Hydro Commission under the contract. [ROBERTSON C.J.O.: You contend that Tomlinson and Brodricks Limited was a simple agent; if that is so, whose agent was it?] Either that of the appellant alone, or, alternatively, that of the appellant and the Brodrick companies.

Had it been contemplated that Tomlinson and Brodricks Limited was to be really a separate entity, the Brodrick companies, in return for the shares issued to them, would have been required to transfer the equipment to it. The whole undertaking and business of Tomlinson and Brodricks Limited was the business of the appellant. W. S. Tomlinson, Sr., who controlled the

appellant, was personally in control of the operations of Tomlinson and Brodricks Limited, and two of the three officers of that company were employees of the appellant.

Under s. 9 of The Assessment Act, R.S.O. 1937, c. 272, the income assessed is that earned in the previous calendar year. The situation must be viewed as it was in 1940, when the assessment was made, not in 1939, when the income was received. The assessment, made in 1940, is a personal assessment of the appellant company. At that time, all the shares of Tomlinson and Brodricks Limited had been re-transferred by the Brodrick companies, and were in us. This being so, the moneys received by the appellant were received from its own business. The plan adopted in the agreement was merely to avoid difficulties of accounting. [ROBERTSON C.J.O.: Would you take the same position if the two original companies had merely formed a partnership, without utilizing a third company?] Yes. [GILLANDERS J.A.: Your point is that the appellant was engaged in a general contracting business, and that in this case it used its equipment and capital, through the other company, for a venture of just that kind?] Exactly, and that it received no remuneration for that venture, except in the form of this dividend.

The fact that Tomlinson and Brodricks Limited was also assessed for business assessment does not improve the City's position. That assessment was made only in 1940, and possibly the company was not properly assessable.

Although these moneys were dividends in form, they were in fact payments under clause 15 of the contract between the companies.

As to agency, I rely on 1 Halsbury, 2nd ed. 1931, pp. 193-4. [GILLANDERS J.A.: It is difficult to reconcile the transfer of rights under the Hydro contract with the conception of agency.] Not necessarily so; here it was only in form that Tomlinson and Brodricks Limited became the owner of the contract. I refer also to Bowstead on Agency, 10th ed. 1944, p. 2. *Re The City of Toronto and The Famous Players Canadian Corporation Ltd.*, [1935] O.R. 314, [1935] 2 D.L.R. 327, affirmed [1936] S.C.R. 141, [1936] 2 D.L.R. 129, was much less clear than this case. I also refer to the words of Rand J. in *Aluminum Company of Canada Limited v. The City of Toronto*, [1944] S.C.R. 267 at 271, [1944] C.T.C. 155, [1944] 3 D.L.R. 600, affirming [1944]

O.R. 66, [1944] C.T.C. 1, [1944] 1 D.L.R. 435 [ROBERTSON C.J.O.: They were not part of the reasons of the majority of the Court.]

The mere fact that two people could “pull the strings” of this company does not affect the legal position of the money which eventually came in. There was divided control, but also divided profit: *Economical Mutual Fire Ins. Co. v. Town of Berlin* (1911), 20 O.W.R. 349; *Re City of Toronto and G. T. Fulford Co. Limited* (1922), 22 O.W.N. 50.

The moneys here in question were not “income” at all, within the meaning of ss. 1(f) and 9(1)(b) of the Act. Section 1(f) recognizes that income may be derived either from the business (directly or indirectly) or from investment. This clearly is in no sense investment income. “Interest from stocks”, by the application of the *ejusdem generis* rule, clearly means investment income *stricto sensu*. The distinction appears in *Worts v. Worts* (1889), 18 O.R. 332 at 340.

In the alternative, these moneys were not “a profit or gain” of the appellant with respect to this transaction. From them must be deducted our cost of getting them—the value of our machinery, services, etc. [ROBERTSON C.J.O.: Does the stated case say that?] Not expressly, but it is a legitimate conclusion.

The onus is on the City to show that these moneys were taxable as income.

J. Palmer Kent, K.C., for the respondent: The sections of The Assessment Act which are relevant are ss. 1(f), 4, 8(1)(g), 9(1)(b), 9(2) and 10. “Profit or gain” need not be from this particular transaction. The “income” of a company is its profit or gain over a year. Other parts of s. 1(f) clearly include this payment. Income exempt from assessment under s. 9(1)(b) must be received directly from the business with respect to which the company is assessed for business assessment under s. 8: *Re City of Toronto and John Northway and Son Limited* (1923), 54 O.L.R. 81; *The City of Toronto v. Rogers-Majestic Corporation Limited*, [1943] O.R. 1, [1942] C.T.C. 239, [1943] 1 D.L.R. 127, affirmed [1943] S.C.R. 440, [1943] C.T.C. 216, [1943] 3 D.L.R. 609.

The County Court Judge here has made a finding of fact that the subsidiary company was not a mere agent or puppet. He has also found that the moneys in question were income not derived

from the business in respect of which the appellant was assessed under s. 8. This is a finding of fact, not subject to review in this Court. [ROBERTSON C.J.O.: But there is a good deal of law involved, and his finding is based upon his construction of the statute.] I refer in this connection to the *Famous Players* case, *supra*; *Re International Metal Industries Ltd. and the City of Toronto*, [1940] O.R. 271, [1940] 3 D.L.R. 50; *Re Russell Industries Ltd. and The City of Toronto*, [1941] O.W.N. 147 at 150, [1941] 3 D.L.R. 361.

Both the appellant and Tomlinson and Brodricks Limited occupied lands and were assessed for business assessment in respect of a contracting business. This proves that Tomlinson and Brodricks Limited was carrying on business as a contractor. This income was exempt from income assessment in its hands, and hence cannot be said to have been derived from the business in respect of which the appellant was assessed.

Before there can be agency as between companies, surely there must be a formal agreement between them. Here it must be found that there was no agency, because (1) the trial judge has so found; (2) there was no agreement setting up an agency; (3) all of the appellant's rights and interest in the Hydro contract were transferred to the new company, and the business then became its business; (4) payments under the contract were made to Tomlinson and Brodricks Limited; (5) there was equal representation on the board of directors.

[ROBERTSON C.J.O.: If the appellant had the power, as it had, to enter into this arrangement, why is not the business part of its business?] It may be part of its business, but not of the business with respect to which it is assessed for business tax. It received this money solely as the holder of shares in Tomlinson and Brodricks Limited, and had no right to it except when a dividend was declared. Whenever a company receives money as a dividend from another company, it is assessable under s. 9(1)(b). [ROBERTSON C.J.O.: But that argument is directly contrary to the *Famous Players* case.] In any case, no agency arrangement was made here. The fact that the two companies combined, reserving no control except through Tomlinson and Brodricks Limited, makes it clear that this was not a mere agency. The business was in fact carried on by a different corporation, and it was much more than a mere conduit through

which the profits flowed: *Aluminum Company of Canada Limited v. The City of Toronto*, [1944] O.R. 66 at 78, [1944] C.T.C. 1, [1944] 1 D.L.R. 435, affirmed [1944] S.C.R. 267, [1944] C.T.C. 155, [1944] 3 D.L.R. 600.

I rely on the principle of such cases as *Salomon v. A. Salomon and Company Limited*, [1897] A.C. 22 at 31; *Pioneer Laundry and Dry Cleaners, Limited v. The Minister of National Revenue*, [1940] A.C. 127, [1939] 4 All E.R. 254, [1939] 4 D.L.R. 481, [1939] 3 W.W.R. 567.

G. A. Gale, in reply: The County Court Judge's decision as to the derivation of this income is clearly not a finding of fact alone. He was alive to the distinction, as shown in the stated case, and his decision is one of mixed fact and law, based upon the construction of the statute.

The fact that these moneys were paid as dividends could be only because we owned shares in Tomlinson and Brodricks Limited. Had we transferred our equipment to it in return for these shares, the situation might have been different. Here, however, at the time of the agreement we owned all the issued shares of the company that became Tomlinson and Brodricks Limited, and the only return we got for the use of our money and equipment on the Hydro contract was this \$55,000.

Section 9(1) (b) does not require that income, to be exempt from assessment, must be derived directly from the business in respect of which we are assessed under s. 8. Section 1(f) uses the expression "directly or indirectly".

We are assessed under s. 8 as a "contractor", without anything further, and this is one of the categories in that section. The cases clearly indicate that income derived from that business is not assessable under s. 9(1) (b); the character of the business is all-important; see the *Northway* case, *supra*; the *Rogers-Majestic* case, *supra*, at p. 450 (S.C.R.); the *Aluminum Company* case, *supra*, at p. 77 (O.R.).

If in fact Tomlinson and Brodricks Limited was our agent or servant, either alone or with the Brodrick companies, then the business is our business: *The Palmolive Manufacturing Company (Ontario) Limited v. The King*, [1933] S.C.R. 131, [1933] 2 D.L.R. 81. There need not be a definite agreement, either orally or in writing, to constitute the relationship of principal and agent.

13th December 1945. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal, by way of stated case, from the decision of Judge Macdonell, of the County Court of the County of York, delivered on 27th July 1945, whereby he confirmed the assessment of the appellant in respect of the sum of \$55,000 of income received by it in 1939. There is no dispute that the appellant received the sum in question, and that that sum came to the appellant in the form of a dividend upon shares held by the appellant in another company, Tomlinson and Brodricks Limited. The question is whether the appellant, admittedly being liable to business assessment by the respondent under s. 8 of The Assessment Act, R.S.O. 1937, c. 272, was also liable to be assessed under s. 9(1)(b) in respect of this sum of \$55,000, as income not derived from the business in respect of which it was assessable under s. 8.

The appellant carries on a general engineering and contracting business. It has wide powers that permit it, in carrying on its business, to enter into partnership or arrangements for sharing of profits, union of interests, co-operation, joint adventure with others, and to promote companies for taking over all or any of its property and liabilities, or for any other purpose that may seem calculated to benefit the appellant, directly or indirectly, and to hold shares in other companies with objects altogether or in part similar to those of the appellant, or carrying on any business capable of being conducted so as directly or indirectly to benefit the company. I think it may be said safely that the appellant's corporate powers were sufficient to have enabled it, either to do, itself, the work from which the \$55,000 was derived, or to make the arrangements that in fact were made whereby the work was done by Tomlinson and Brodricks Limited in whatever relationship it shall be determined that the latter company stood to the appellant under the arrangement hereinafter referred to.

The appellant, on 9th July 1937, entered into a contract with the Hydro-Electric Power Commission of Ontario to execute, for the Commission, a work known as the Long Lac Diversion. The appellant in preparing and submitting its tender for the work, did so in association with two other companies, Brodricks Contractors Limited and Brodricks Brothers Limited, with the

intention and the agreement with the Brodrick companies that in the event of the appellant being awarded the contract, the appellant and the two Brodrick companies would prosecute the work by joint effort.

To implement this intention and agreement a formal agreement was entered into on 5th October 1937 between the appellant and the two Brodrick companies. By clause 1 of this formal agreement it was provided as follows:

“(1) It is agreed that the prosecution of the work on Long Lac Diversion shall be done by Tomlinson and Brodricks Limited, to which Corporation the said contract will be assigned by Tomlinson Construction Company Limited.”

When this agreement was made, Tomlinson and Brodricks Limited was a company already incorporated, but under another name. When it was arranged to use that company for the purpose of the contract with the Hydro Commission, the name of the company was changed to Tomlinson and Brodricks Limited.

The agreement of 5th October 1937 is of the first importance in the determination of this appeal. It is, however, much too long to quote in full, and I shall summarize only some of its more important provisions.

It was agreed that the Tomlinson Construction Company Limited, on the one hand, and the two Brodrick companies, on the other hand, should have equal representation on the board of directors of Tomlinson and Brodricks Limited, and should provide in equal amounts such funds as might be required for preliminary investigation of the work and site thereof, including all expenditures and commitments made to the date of the agreement, and to supply the working capital necessary to establish camps and transportation facilities, to pay for supplies and freight, labour and materials, and, in general, all costs of execution of the work, except as might be thereafter noted, until contract progress estimate receipts made it self-sustaining.

The Tomlinson Construction Company Limited, on entering into the contract with the Commission, had deposited its cheque for \$103,106.25, being 10 per cent. of the tender price, and later had deposited with the Commission its further cheque for \$343,687.50, in pursuance of a term of the contract with the Commission requiring that a cash payment of 50 per cent. of the amount of the contract price be deposited with the Commis-

sion. By the agreement of the 5th October the Tomlinson Construction Company Limited agreed to provide and maintain the cash or other security required by, and satisfactory to, the Commission, as stipulated in the contract. Both Tomlinson Construction Company Limited and the Brodrick companies agreed to supply plant and equipment for the prosecution of the work, as more particularly set out in the agreement, on the understanding that all plant and equipment items should, on the completion of their use on the contract, be returned to their owners in good working order, subject to ordinary wear and tear. Costs of dismantling for car shipment, loading at point of origin and unloading, and intermediate handling and transport to the work, and similar items in outgoing return, on completion of the job were to be charged to the cost of the work under the contract. All costs of field and shop repairs required on the job to properly maintain the plant and equipment in good working condition were to be charged to the cost of the work, as were also any small tools and supplies furnished by the parties for the work. Any purchases of major plant and equipment items required specifically for this contract were to be determined on by agreement between the parties, and the cost of them was to be defrayed out of the working capital or receipts of the contract.

The agreement of the 5th October further provided that 100 shares of Tomlinson and Brodricks Limited should be issued as fully paid and non-assessable, 50 per cent. to the Tomlinson Construction Company Limited or its representatives, and 50 per cent. to Brodricks Contractors Limited or its representatives, "in consideration of working capital supplied and services rendered by the said latter Companies." The remaining 300 shares of Tomlinson and Brodricks Limited were to remain in the treasury of that company subject to issue at the discretion of the full board of its directors. The fact appears to be that there had already been issued 100 shares of the capital stock of Tomlinson and Brodricks Limited, which were held by W. S. Tomlinson, Sr., the president of the appellant company. By arrangement he transferred 49 of these shares to W. B. Brodricks and one share to Frank Brodricks, and retained in trust for the appellant 49 shares in his own name, and one share in the name of another shareholder.

The last two clauses of the agreement of 5th October should be quoted in full. They are as follows:—

“(14) In order that there may be a proper accounting record of the actual cost of the Long Lac Diversion work, there shall be a complete inventory made of the value of all equipment and supplies furnished for the work by the Companies represented by the parties hereto, at the time such items are delivered at Long Lac Station. For like purposes, accounts shall be rendered monthly, and set up in the cost records, showing the amount of actual interest charges on securities or monies supplied by the parties, and rentals for equipment supplied, at rates to be mutually agreed upon by the parties hereto. It is agreed, however, that there shall be no actual cash settlement of accounts for interest and plant rentals as such, but that compensation, if any, for these charges shall be included in the equal division between the parties hereto, of any cash surplus or profits from the work at its completion. Similarly, in case of loss on the contract, these accounts for interest and rentals shall be disregarded, and the actual cash loss borne equally by the said parties.

“(15) The Brodrick Companies agree to contribute one-half of any sum or sums of money which the Tomlinson Company may be called upon to pay by reason of it being primarily liable to the Hydro-Electric Power Commission of Ontario for the performance of the said contract dated the ninth day of July, 1937.”

The contract with the Hydro Commission was assigned on the 12th August 1937 by the appellant to Tomlinson and Brodricks Limited. W. S. Tomlinson, Sr., became president of Tomlinson and Brodricks Limited, and W. B. Brodricks became vice-president. W. S. Tomlinson, Sr. was placed in control of the policy of Tomlinson and Brodricks Limited and made the final decisions. Frank Brodricks became the working superintendent on the job, while W. B. Brodricks did some supervising from time to time. No salary was paid to W. S. Tomlinson, Sr. or to W. B. Brodricks, but Frank Brodricks was paid a salary as superintendent.

Tomlinson and Brodricks Limited occupied a room at 21 King Street East in the building in which the appellant had its offices. Rent for this room was paid by Brodricks Contractors

Limited, and in the final settlement of accounts a proportion of this rent, and of the wages of a book-keeper, were balanced against certain services that had been provided by the appellant.

The contract with the Hydro Commission was finished in October 1939, and in December of that year Tomlinson and Brodricks Limited declared a dividend, which resulted in the payment to the appellant of \$55,000, being the sum in dispute.

The appellant was liable to business assessment for the year in which this sum was received, and was in fact actually assessed as a contractor under s. 8 of The Assessment Act in respect of offices which it had at 21 King Street East, in Toronto. Tomlinson and Brodricks Limited was assessed for business assessment in respect of a room rented by it at the same address. The appellant, being liable to business assessment, could be assessed only in respect of any income not derived from the business in respect of which it was assessable for business assessment under s. 8. The question is, therefore, whether the \$55,000 received by the appellant by way of dividend declared and paid by Tomlinson and Brodricks Limited, was income that was not derived from the business in respect of which the appellant was assessable for business assessment at its offices at 21 King Street East. The stated case says that this was the appellant's head office, and was occupied and used by it for the purpose of carrying on its business.

It is plain from the terms of s. 9(1) (b) that it contemplates that a corporation may carry on a business within the meaning of s. 8, and may occupy or use land for the purpose of that business, and may also be in receipt of income that is not derived from that business. While all the activities and transactions of a corporation within its corporate powers may be broadly described as the business of the corporation, for the purposes of income assessment under s. 9 of The Assessment Act, the source of the corporation's earnings or income may be capable of separation and classification, so that, for example, income derived from investments will be regarded as income not derived from the business carried on by the corporation at a particular place. This is illustrated by such cases as *Re City of Toronto and John Northway & Son Limited* (1923), 54 O.L.R. 81; *The City of Toronto v. Rogers-Majestic Corporation Limited*, [1943] O.R. 1, [1942] C.T.C. 239, [1943] 1 D.L.R. 127, affirmed [1943]

S.C.R. 440, [1943] C.T.C. 216, [1943] 3 D.L.R. 609; and *Aluminum Company of Canada Limited v. The City of Toronto*, [1944] S.C.R. 267, [1944] C.T.C. 155, [1944] 3 D.L.R. 600. It is not open to the appellant here summarily to conclude all argument by saying simply "We have only one business, that of general contractors, which our charter powers give us liberty to carry on or to engage in under many different arrangements and in different capacities or relationships, but it all comes within the description of the company's business."

On the other hand, it is not necessarily a conclusive argument on the part of the respondent to say that there is an express finding by the learned County Court Judge that the income in question was not derived from the business of the appellant company in respect of which it was assessable under s. 8, and that this is a finding of fact that this Court cannot review. No doubt, in *Re The City of Toronto and The Famous Players Canadian Corporation Ltd.*, [1935] O.R. 314, [1935] 3 D.L.R. 327, affirmed [1936] S.C.R. 141, [1936] 2 D.L.R. 129, the finding of the Ontario Municipal Board as to the nature of the company's business was, in the circumstances of that case, regarded as a finding of fact and not to involve any question of law, and, consequently, the finding of the Municipal Board was not subject to review on appeal. As pointed out, however, by Masten J.A. in his judgment in that case, which was the judgment of the majority of the Court of Appeal, circumstances may exist where a question of law may be involved as well. That this is so is illustrated by the case of *The City of Toronto v. Rogers-Majestic Corporation Limited*, *supra*.

I have referred to the foregoing propositions as they were raised in argument by the appellant and respondent respectively. A contention of the appellant, based more particularly upon the special circumstances of this case, is that the income in question was derived from a contract executed by the appellant in co-operation with the two Brodrick companies, and that there was in fact a partnership existing into which the appellant had power to enter under the express terms of its letters patent. For the appellant it is further urged that even if there was not a partnership, there was, at least, a joint adventure on the part of the companies that entered into the agreement of 5th October 1937,

and that under that agreement the execution of the work under contract with the Hydro Commission was done by Tomlinson and Brodricks Limited as the agent of the other companies, and that the money paid them by way of dividend was, in truth, their own money, earned under the Hydro contract.

Whether income that a partner receives from the co-partnership business can, under any conceivable circumstances, be regarded otherwise than as income not derived from a business that he carries on alone, and therefore assessable under s. 9(1)(b) of The Assessment Act, is I think, open to grave question. In my opinion the terms of the agreement of 5th October 1937 are such that the question does not arise. The respective parties of the first and second parts in that agreement were neither of them making the other its agent in performing the contract with the Hydro Commission, as would be of the very essence of a partnership arrangement. Neither were they making Tomlinson and Brodricks Limited their agent for that purpose. The obligations they respectively undertook, the one to the other, they defined in their agreement, and they avoided the undertaking of responsibility for any debts or liabilities to others that might arise in the execution of the work, except the obligations to the Hydro Commission, which, by reason of the contract and of the security that had been put up, were unavoidable. As to obligations to the Hydro Commission, express provision was made in the last clause of the agreement of 5th October 1937, that the Brodrick companies would contribute one-half of any sum or sums of money that the Tomlinson company might be called upon to pay by reason of its being primarily liable to the Hydro Commission for performance of the contract. The absence of any provision for contributing in respect of any other liabilities is significant of their understanding that they did not assume any others.

The assignment of the Hydro contract to Tomlinson and Brodricks Limited, with the agreement that the prosecution of the work on Long Lac Diversion should be done by it, the acceptance of shares in that company, fully paid and non-assessable, in consideration of working capital supplied and services rendered by the other companies, with the provision that no new shares should be issued except at the discretion of the full board of directors, the equal division of the issued shares between

the companies, and the provision for equal representation on the board of directors, are all, to my mind, significant of an intention that Tomlinson and Brodricks Limited should become the principal, and not a mere agent, in the prosecution of the work under contract with the Hydro Commission, and that the appellant and the two Brodrick companies should protect their interests and exercise control of Tomlinson and Brodricks Limited as its shareholders and directors, rather than as principals towards an agent. No doubt, there are a number of the provisions of the agreement of 5th October 1937 that would be equally appropriate and useful whichever relationship it was intended should be created, but reading that agreement as a whole, I am of the opinion that the contract made with the Hydro Commission was assigned to Tomlinson and Brodricks Limited with the intention that the carrying out of that contract should be its business.

For these reasons I would answer the question asked in the stated case in the affirmative.

The respondent is entitled to its costs of the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: Mason, Foulds, Davidson & Gale, Toronto.

Solicitor for the respondent: W. G. Angus, Toronto.

[COURT OF APPEAL.]

Olin v. Perrin et al.

Wills—Dependants' Relief—Separation Agreement with Payment of Lump Sum by Husband—Whether Wife Entitled to Claim Allowance out of Estate—The Dependants' Relief Act, R.S.O. 1937, c. 214, ss. 7, 9.

O and his wife entered into a separation agreement, under which O paid a lump sum to his wife which was accepted by her as "a complete discharge of all responsibility of the husband for the supplying of support and maintenance to the wife." O then arranged with P to act as his housekeeper, promising that he would leave her his entire estate when he died. O died in 1944, leaving the entire residue of his estate to P. O's widow applied for an allowance for support and maintenance under The Dependants' Relief Act.

Held, the widow's application must fail.

Per ROBERTSON C.J.O. and GILLANDERS J.A.: The wife, having received the full amount payable to her under the separation agreement, would not have been entitled to sue for alimony, and was therefore "living apart from her husband at the time of his death under circumstances disentitling her to alimony", and s. 9 of the Act constituted a complete answer to her claim. The section was not to be restricted to misconduct of the wife, but was to be given its plain meaning. *Re Carey*, [1940] O.R. 171, distinguished.

Per GILLANDERS and LAIDLAW J.J.A.: Considering all the circumstances enumerated in s. 7 of the Act, particularly the provision made for the wife by the separation agreement, and her means at the time of the application, it must be said that she had failed to make out a case under the Act, and her application must be dismissed on that ground.

Per GILLANDERS J.A.: O's agreement with P was not in itself a bar to the widow's application. P must accept the position that the provision in her favour in the will, made in pursuance of that agreement, was liable to be reduced by an order of the Court in favour of the widow, since her claim was not one that must be discharged before distribution. *Dillon v. Public Trustee of New Zealand et al.*, [1941] A.C. 294, applied (*LAIDLAW J.A. contra.*)

AN APPEAL by the widow of Arnilda Olin, deceased, from an order of Smoke Sur. Ct. J., of the Surrogate Court of the County of Peterborough, dismissing an application under The Dependants' Relief Act, R.S.O. 1937, c. 214.

8th and 9th November 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW J.J.A.

J. H. Amys, for the applicant, appellant: The trial judge erred in holding that the agreement in question formed a binding obligation upon the estate of the deceased which took precedence over the rights of the appellant under The Dependants' Relief Act, R.S.O. 1937, c. 214. Pursuant to the provisions of this statute concerning the circumstances of the testator, the time to be considered is the date when the will was made; *Re Hull Estate*, [1943] O.R. 778 at 785, [1944] 1 D.L.R. 14.

The trial judge erred in finding that there was a binding agreement to leave the estate by will to Hester Perrin: *Dillon v. Public Trustee of New Zealand et al.*, [1941] A.C. 294, [1941]

2 All E.R. 284, [1941] 3 W.W.R. 865. [LAIDLAW J.A. We must consider what gifts the deceased made to the appellant before the will was made.] The monies received by the appellant under the terms of the separation agreement should not be considered adequate for a woman of her years. This Court should take a liberal view as to whether she had adequate maintenance: *Collins et al. v. Public Trustee et al.*, [1927] N.Z.L.R. 746.

R. M. Willes Chitty, K.C., for the respondents: It must be taken into consideration that in 1941 the appellant executed a separation agreement. She was paid off and could not expect that any provision would be made by will. Unless this Court should hold that the agreement of 1941 was so inadequate that it did not provide for her future maintenance, then it cannot be said that this will did not provide adequate maintenance for the widow. The question whether proper maintenance has been provided is largely one of fact. There is no evidence to show the needs of the widow at the date of the will or the circumstances of the testator at the time of the will. The trial judge has arrived at the correct conclusion. *Re Hull Estate, supra*, is more in favour of the respondents than of the appellant.

Dillon v. Public Trustee of New Zealand et al., supra, is under a different statute, and in any event it is a good deal narrower than counsel for the appellant has suggested. It should not be extended beyond the decision made there. The case at bar is not that of a contract made prior to the marriage of the testator. Here the testator had made a proper separation agreement, and he later executed a will. The *Dillon* case cannot be stretched to cover those circumstances. In this instance the appellant has accepted all that she is entitled to and all that she can get. I refer to the editorial note in [1941] 2 All E.R. at p. 284. The testator made his will with the knowledge that he had made all necessary provision for his wife, since she had voluntarily accepted a lump sum which was to maintain her for the rest of her life. The trial judge came to the only conclusions possible on the evidence.

The appellant is not in a position where she could sue for alimony, and therefore in these circumstances, the Court should find that she is barred by s. 9 of The Dependents' Relief Act, R.S.O. 1937, c. 214, because in fact and in law she was disentitled to alimony. [ROBERTSON C.J.O.: The trial judge seemed to think

of disentitlement under s. 9 as the result of misconduct. The section states that a wife must be living apart from her husband in circumstances that would disentitle her to alimony. Here it is not circumstances that disentitle her but her own agreement.] Surely that is part of the circumstances. *H. v. H.*, [1944] O.R. 438, [1944] 4 D.L.R. 173 (*sub nom. Hawn v. Hawn*). Under the law of England it is clear that this appellant could never get a decree for restitution of conjugal rights: *Welch v. Welch* (1916), 115 L.T. 1; *Kennedy v. Kennedy*, [1907] P. 49. In these circumstances the appellant does come within s. 9 and is barred from making the present application.

This Court should conclude that it would be unconscionable to alter provisions for Hester Perrin since she looked after the deceased in place of his wife for the last three years of his life.

J. H. Amys, in reply: The separation agreement itself would not disentitle the appellant to alimony. I refer to the following cases: *Hyman v. Hyman*, [1929] A.C. 601; *Re Carey*, [1940] O.R. 171, [1940] 1 D.L.R. 362; *Skaith v. Skaith*, [1936] O.W.N. 558, [1936] 4 D.L.R. 653.

Cur. adv. vult.

19th December 1945. ROBERTSON C.J.O.:—I concur in the dismissal of this appeal. I do so, however, upon one ground only, and that is that s. 9 of The Dependants' Relief Act, R.S.O. 1937, c. 214, prevents an order being made in favour of the appellant. She was living apart from her husband at the time of his death, under circumstances which would disentitle her to alimony. I do not think this section of the statute has the restricted meaning given to it by the learned Surrogate Judge. I think the words are to be given their ordinary meaning, and that a wife may become disentitled to alimony by the terms of a valid agreement. The extracts from the separation agreement that Mr. Justice Gillanders has set forth in his reasons for judgment sufficiently indicate that the appellant had accepted the moneys and property transferred to her, as a complete discharge of all responsibility of the husband for her support and maintenance. I refer to *Atwood v. Atwood* (1893), 15 P.R. 425, affirmed (1894), 16 P.R. 50. I think Mr. Justice Gillanders has properly distinguished *Re Carey*, [1940] O.R. 171, [1940] 1 D.L.R. 362.

In the circumstances I think there should be no costs of appeal to either party, particularly in view of the fact that the

Surrogate Judge had taken the opposite view to that that I have expressed on the effect of s. 9.

GILLANDERS J.A.:—The applicant appeals from an order made by His Honour Judge Smoke, Judge of the Surrogate Court of the County of Peterborough, on an application under the provisions of The Dependants' Relief Act, R.S.O. 1937, c. 214, dismissing the applicant's claim against her deceased husband's estate for an allowance under the provisions of s. 2 of the said Act.

The appellant and the late Arnilda Olin were married in 1923. He was at that time a widower and had three young daughters ranging from six to twelve years of age, issue of a prior marriage. He worked as a carpenter, and later as a contractor on his own behalf, buying old houses and rehabilitating them, and later building new houses. The appellant and her husband lived together until October 1941, when they separated and entered into a written separation agreement in pursuance of which the husband paid his wife \$3,000 in cash and assigned to her a mortgage for \$1,000. At that time Arnilda Olin's assets consisted of \$1,900 cash in the bank, and a house later sold for \$4,200, so that on separation, out of assets worth approximately \$7,100, he turned over to his wife \$4,000. After Olin's separation from his wife in 1941 he arranged with the respondent Hester Perrin to act as his housekeeper and, except for a short interval of time, she so acted until his death in March 1944. They were not related in any way. The appellant indicated in her evidence at the trial that Olin's association with Mrs. Perrin was among others a cause of their separation, and at the trial some attempt was made to prove that after Olin and his wife separated Mrs. Perrin lived with him as his common law wife, but the trial judge finds there is no evidence to support such a suggestion. Mrs. Perrin testified that at or about the time of the separation from his wife Olin asked her to come and keep house for him, and she did so on the verbal promise that he would leave her everything he had. At one time she left because of objection to his drinking, but he sought her return, repeated his former promise to leave her everything he had "when he was through", and she returned and remained as his housekeeper until his death. The trial judge finds further evidence that Mrs. Perrin did act as housekeeper in the testi-

mony of the deceased's daughters, and he finds corroboration of the verbal arrangement alleged by Mrs. Perrin in the evidence of two other witnesses.

By deed made and duly registered in September 1943 Olin conveyed to himself and Mrs. Perrin as joint tenants a house property. By his will, made in July 1943, after providing for payment of his debts, funeral and testamentary expenses, and legacies of \$5 to each of his three daughters, then all married, he left the whole residue of his estate to Mrs. Perrin. The appellant wife was left nothing under the will, and brought these proceedings seeking an allowance for her maintenance. Olin's estate, excluding of course the jointly-held property, was valued on probate for succession duty purposes at \$5,574.48. The trial judge held that by virtue of s. 1, paras. (e) and (f) of The Dependants' Relief Act he should, in considering the circumstances of the testator, add to the value of the estate proper the value of the property which the testator had during his lifetime conveyed to himself and Hester Perrin as joint tenants, and which was valued for succession duty purposes at \$4,500. On this basis he finds the total value of the assets of Arnilda Olin to be considered for purposes of this application to be \$10,074.48. The debts and succession duties owing by the estate totalled \$3,815.20.

The learned trial judge held that the appellant widow was not "living apart from her husband at the time of his death under circumstances which would disentitle her to alimony", so that her claim was not barred by s. 9 of the Act, but he held that there was a binding agreement between the deceased and Hester Perrin whereby the deceased agreed for good consideration to leave her his property, and that this agreement took precedence over the widow's claim under the Act, with the result that, when the obligation under the agreement was discharged, there was no estate left upon which any order could operate. Having so concluded, he did not consider whether, if the agreement did not take precedence, the testator by his will had so disposed of his property that adequate provision had not been made for the appellant.

On the appeal it was contended for the appellant:

(1) that no binding agreement with Hester Perrin had been proved (and it may be said at once that there is ample

evidence to support the trial judge's finding on this point and it should not be disturbed);

(2) that even if the agreement with Hester Perrin was binding on the deceased's estate, it did not take precedence over any rights the appellant might be able to establish under The Dependants' Relief Act. This latter submission is one of substance. In *Dillon v. Public Trustee of New Zealand et al.*, [1941] A.C. 294, [1941] 2 All E.R. 284, [1941] 3 W.W.R. 865, the Privy Council considered a provision (s. 33, subs. 1) of The Family Protection Act, 1908, of New Zealand, providing:

"If any person (hereinafter called the 'testator') dies leaving a will, and without making therein adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the court may at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children."

The Board held that there was nothing in the provision there considered which restricted the power of the Court to redistribute the estate of a testator in a case in which the provisions of the will were a fulfilment of a contract entered into *inter vivos*. The Act there under consideration was in many respects quite different from the statute here in question, but on the point being considered, that is, whether or not the contract made *inter vivos* with Mrs. Perrin takes precedence over the appellant's claim, if established, it would seem to be helpful. In the case cited, Henry Dillon, senior, had in his lifetime, after the death of his first wife and before he married his second wife, who later was the plaintiff in the proceeding, made a family arrangement with certain of his children, two sons and three daughters, for the working and operation of his farm lands during his lifetime, and for good consideration he undertook that by his will he would devise these lands to three of these children. This he did, and when, after his death, his widow, whom he had married after the family arrangement had been made, commenced proceedings, it was this arrangement which came into conflict with her claim. It seems desirable to quote somewhat at length from the judgment, delivered by the Lord Chancellor (Viscount Simon):

"Their Lordships cannot regard it as a correct exposition of s. 33 of the Family Protection Act to say that it imposes on a husband the obligation to make adequate testamentary provision for the maintenance and support of his wife. The statute does not impose any duty to frame a will in any particular way, and the testator did not fail to observe any statutory obligation by making his will as he did. What the statute does is to confer on the court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations out of the testator's estate, notwithstanding the provisions which the will actually contains. If the testator does not make adequate provision in his will for wife, husband, or children, he does not thereby offend against any legal duty imposed by the statute. His will-making power remains unrestricted, but the statute in such a case authorizes the court to interpose and carve out of his estate what amounts to adequate provision for these relations if they are not sufficiently provided for. The interposition of the court should take place, of course, only after considering all relevant circumstances, and among these circumstances may be the fact that the testator was under obligation to third parties . . .

"Myers C.J. and Ostler J took the view that, inasmuch as the provision in the will for the children was made in fulfilment of a contract for valuable consideration contained in clause 17 of the agreement, the court has no jurisdiction to make an order under s. 33 of the Family Protection Act which, for the purpose of increasing the widow's share, would cut down what the testator had, in fulfilment of his promise, left to his children. Their Lordships cannot accept this view. Myers C.J. truly observed that if Henry Dillon, senior, had transferred his lands to his children during his lifetime, the Family Protection Act could not operate upon them. This is plainly the case, for s. 33 of the Act only applied if the testator dies leaving a will without making adequate provision therein for the proper maintenance and support of the testator's wife, etc. If these conditions are fulfilled, the court has jurisdiction, at its discretion, to order that such additional provision as the court thinks fit shall be made for the inadequately provided wife out of the testator's estate. There can be no dispute or doubt that the lands left

to the children form part of the testator's estate, and the children are bound to accept the position that the provision made for them is liable to be reduced by order of the court in favour of their stepmother, unless, indeed, their claim on the estate could be regarded as constituting a debt which has to be discharged before benefits are distributed. But these devisees are not creditors of the estate. They are beneficiaries under the will. There is nothing in the nature of a debt owing to the children from the testator's estate. The testator has done what he contracted to do, namely, to make the testamentary provisions defined in clause 17 of the agreement."

Applying the views of the Lord Chancellor to the facts here, Hester Perrin is bound to accept the position that the provision in the will in her favour in fulfilment of her arrangement with the deceased was liable to be reduced by an order of the Court in favour of the testator's widow unless her claim is one which must be discharged before distribution. Here, where she had an arrangement which the testator has carried out, I think it must be accepted by her subject to the possibility that the balance for distribution might be affected by an order of the Court made in pursuance of The Dependants' Relief Act.

If, then, the agreement with Hester Perrin is, under the circumstances, no absolute bar to the appellant's claim, it remains to consider whether or not a case is made out where the Court may or should make an order for the appellant's benefit, and whether or not she is affected by the provisions of s. 9 of the Act.

The learned trial judge did not consider whether in all the circumstances the testator had so disposed of his property that adequate provision had not been made for the appellant. However, the relevant facts are all either undisputed or found by the trial judge. Under these circumstances it is open to this Court to consider the facts and reach what it conceives to be the right conclusion. Even if the matter had been passed upon at the trial on facts that were not disputed, it would be "not only the right but the duty of this Court" to reach its own conclusions: *per* McGillivray J.A. in *In re Anderson Estate*, [1934] 1 W.W.R. 430, [1934] 2 D.L.R. 484. Section 7 of the Act indicates various matters to be inquired into and considered. The evidence tendered as to the circumstances of the deceased relates to the

date of separation and that of his death. As previously stated, the trial judge has found the gross value of his estate to be \$5,574.48 and debts and succession duties amounting to \$3,815.20, which would leave a net estate of \$1,759.28. To this he thought he should add the value of the property conveyed by the deceased to himself and Mrs. Perrin jointly. In respect of this property, an undivided one-half interest passed to Hester Perrin at once by virtue of the conveyance made in the testator's lifetime. The undivided one-half interest still held by the testator is all that could be said to pass at his death and in respect of which he might be held to be a testator within the provisions of s. 1(e) of the Act or which might be affected by para. (f) of the same section. I assume this one-half interest might be valued at one-half of the total value of the property, fixed at \$4,500, that is, \$2,250. This would place the total value of the testator's assets, to be considered in respect of the claim here made, at \$4,009.78.

Under s. 7(b) the circumstances of the appellant are relevant. On this point, the evidence indicates that of the \$4,000 settlement she received in 1941, she still has assets worth \$3,358. She testifies that since she left her husband she has lived with her married sister and assisted her for her board and lodging. She says she suffers somewhat from high blood pressure and she cannot work "like I used to". She has no assets other than the residue of her separation settlement.

Among other matters which should be taken into account under para. (c) of s. 7 is the fact that the testator was under an obligation to Hester Perrin, who had carried out her part of the arrangement to serve as his housekeeper. The contract with her, while not a complete bar to the appellant's proceedings, is a factor to be considered.

It may be noted that the amount the appellant received in 1941 was approximately two-thirds of the testator's total assets at that time; that if he had died intestate and his net estate after the payment of debts (not considering any obligation to Hester Perrin) had devolved on her, she would only have received something less than \$1,750 after the payment of costs; and that since 1941 she has only found it necessary to encroach on her capital of \$4,000 to the extent of less than \$650, leaving approximately \$3,350 still in her hands.

The onus is on the appellant to make it appear that the testator by his will has disposed of his estate without making adequate provision for her as his dependant. Considering all the relevant circumstances here, I think she has not discharged this onus.

While it is unnecessary, in this view, to express an opinion on the contention that in any event s. 9 provides a defence, it seems desirable to pass upon this question also. The separation agreement entered into between the testator and the appellant provides, *inter alia*:

"1. The husband and wife will henceforth live separate from each other and neither of them will . . . make any demands whatsoever upon the other arising from their status as husband and wife."

"5. The said monies and property shall be respectively paid and transferred to the wife to be used by her for her support and maintenance and shall represent and shall be a complete discharge of all responsibility of the husband for the supplying of such support and maintenance to the wife."

"11. The husband and wife mutually agree and covenant for themselves, their respective heirs, executors, or administrators that they will execute such further assurances as may be necessary to give full effect to the covenants and agreements herein contained."

In *Re Carey*, [1940] O.R. 171, [1940] 1 D.L.R. 362, this Court considered the effect of s. 9 in connection with a widow's claim under the Act, but the difference between the provisions of the separation agreement there being considered and the provisions of the present agreement are to be noted. The husband agreed to pay his wife \$55 per month during the separation and so long as the claimant should remain his wife. In holding that the applicant in that case was not living apart from her husband at the time of his death under circumstances disentitling her to alimony, Robertson C.J.O. said, in part:

"While the separation agreement does not mention alimony, I think it may be taken that so long as the husband observed the terms of the agreement and made the monthly payments for maintenance required by it, the wife could not successfully have sued for alimony. That is not enough, however. Appellant must show that the wife had become disentitled to alimony. The matter

may be tested by enquiring what rights the wife would have had in case the husband had made default in the monthly payments. There is authority that in such case the wife might sue for alimony, as such, and obtain an order for payment of interim alimony, according to the practice peculiar to alimony actions. In *Wood v. Wood* (1887), 57 L.J. Ch. 1, an order for interim alimony was made in just such a case, the wife not being compelled to resort to an action on the separation agreement. The reason for this seems plain. The periodical payments for maintenance are in truth the payment of alimony, although not so called. The judgments in the case of *Wood v. Wood* on appeal were given by Lindley L.J. and Lopes L.J. and it is significant to note that in the course of their reference to the cases of *Powell v. Powell* (1874), L.R. 3 P. & D. 186 and *Gandy v. Gandy* (1882), 7 P.D. 168, and to the payments for maintenance made under separation deeds in those cases, they both speak of them as payments of 'alimony'. This use of the word 'alimony' is quite within its proper meaning although among lawyers it is more usually applied to an allowance made to a wife by order of Court."

The present agreement differs in that, instead of periodic payments, the entire consideration agreed to effect "a complete discharge of all responsibility of the husband for the supplying of . . . support and maintenance to the wife" was made in full at the time the agreement was executed. Nothing more remained for the husband to do or pay. It follows that there were no obligations left for the husband to perform, default in the performance of which might re-open the wife's right to sue for alimony. It seems clear the appellant here could not have successfully sued for alimony. That was because she had, in effect, received it and released any right which she might otherwise have had. It is suggested that this situation should be distinguished from, for example, misconduct on her part, which would have deprived her of the right to make such a claim. I am not able so to restrict the construction of s. 9. Assuming that, apart from the provisions of the separation agreement, the appellant here would, while living apart from her husband, have been entitled to alimony, the release and settlement of that right, for valuable consideration not claimed to be inadequate or unfair, fully paid and discharged, with no

possibility remaining open of her right ever reviving, constitutes a circumstance disentitling her to alimony, under which she was living at the time of her husband's death. In this view the section provides an effective answer to the appellant's claim.

The appeal must be dismissed, but, under the circumstances here, there should be no costs of the appeal.

LAILAW J.A.:—The widow of the late Arnilda Olin appeals from an order of His Honour Sheldon L. Smoke, dated the 28th day of June 1945, dismissing an application made by her pursuant to the provisions of The Dependents' Relief Act, R.S.O. 1937, c. 214, for an order charging the estate of the said Arnilda Olin with payment of an allowance to the applicant sufficient to provide for her maintenance.

The applicant and her husband separated in September or October 1941, and lived apart under the terms and conditions of an agreement in writing dated the 8th October 1941. Under the provisions of that agreement the late Arnilda Olin paid the applicant the sum of \$3,000 and assigned a mortgage for \$1,000 to her. He proposed to Hester Perrin that she should be his housekeeper, and, according to her testimony, accepted by the learned judge in the court below, promised that if she would keep house for him he would leave her everything "when he was through". She kept house for him until his death, upon that understanding and agreement between them. He made his last will and testament bearing date the 26th day of July 1943, and after providing therein for a legacy of \$5 to each of his three daughters, he devised and bequeathed the residue of his estate to Hester Perrin. He also made a conveyance of certain realty to himself and Hester Perrin as joint tenants. He died on or about the 25th day of March 1944, leaving an estate the net value of which at the time of his death was \$5,574.28, exclusive of the realty in the joint names of himself and Hester Perrin, which was valued for the purpose of succession duties at \$4,500. The debts of the testator amounted to \$2,669.95 and succession duties to \$1,145.25, making a total sum of \$3,815.20, thus leaving the net value of the estate which passed upon the death of the deceased at the sum of \$6,259.28.

The learned judge held that there was a binding agreement made between the deceased and Hester Perrin, "and that such agreement was substantially carried out by the deceased in

the making of the will." I think that judgment is right. Both in law and in equity Hester Perrin became entitled to all the net assets of the late Arnilda Olin at the time of his death by reason of the contractual obligation assumed by him. He was bound to dispose of those assets in accordance with his binding promise. Her evidence is sufficiently corroborated, as found by the learned judge, and her right to the net assets of the estate is, in my opinion, clear. In consequence there are no assets of the estate out of which the Court can order an allowance for maintenance to the applicant.

Apart altogether from the effect of the agreement between the deceased and Hester Perrin, it is my view that upon proper inquiry and consideration of the matters enumerated in s. 7 of The Dependants' Relief Act, the application made by the widow of the deceased for an order directing an allowance out of the estate for her maintenance ought to be dismissed. By s. 7(d) the Court is required to consider, *inter alia*, "any provision which the testator may have made *inter vivos* for . . . any dependant;" also, by para. (b), "the circumstances of the person on whose behalf the application is made". The testator, in October 1941, about two and a half years before his death, gave the applicant the sum of \$3,000 and assigned to her a mortgage in the sum of \$1,000. This was a substantial part of his assets, which at that time consisted of the sum of \$1,900 in the bank and real estate of the value of approximately \$4,200. At the time of the application the applicant possessed securities of the face value of \$2,950, and also about \$400 in cash. I conclude from my consideration that the deceased made generous provision for the applicant during his lifetime and the circumstances of the applicant do not support a claim for an allowance for her maintenance from the estate of the testator.

I would accordingly dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the applicant, appellant: Peck, Kerr & McElderry, Peterborough.

Solicitors for the executors, respondents: Elliott, Philp & Chandler, Peterborough.

[COURT OF APPEAL.]

Papadakis v. Harakas.

Landlord and Tenant—Constitution of Relationship—Reservation by Lessor of Right to Occupy Part of Premises—Wartime Controls.

An agreement was made for the sale by the defendant to the plaintiff of a restaurant business, and a lease to the plaintiff of the building in which the defendant had carried on that business. The upper floor of this building had been used by the defendant as living quarters, and the lease, which was for five years, provided that the defendant "shall have the right to continue to reside in and to occupy" the upper floor for two years, and to be supplied with gas, etc., at the plaintiff's expense, and that during that time the plaintiff would "permit and allow such residence and occupation", in consideration of which the plaintiff should be entitled to deduct \$20 from each monthly payment of rent under the lease.

Held (LAIDLAW J.A. *dissenting*), the defendant never became a "tenant" of the plaintiff in respect of the upper floor, within the meaning of the wartime orders and regulations applicable to rented premises, and was therefore not entitled to the protection of those orders and regulations. The term in the lease was either an exception or a reservation and the plaintiff never acquired any right of occupation of the upper floor, upon which he could found either a sub-lease or a "leave and licence" to occupy.

AN APPEAL by the defendant from the judgment of Kelly J., [1945] O.W.N. 707, [1945] 4 D.L.R. 758. The following statement of facts is taken from the reasons for judgment of LAIDLAW J.A.:

By a judgment of Kelly J., delivered on the 20th July 1945 after trial on the 6th March 1945 at the non-jury sittings of the Court at Toronto, it was ordered and adjudged that the plaintiff is entitled to possession of the upper floor of 227 Church Street, Toronto, and that the defendant forthwith deliver up the possession of the said premises to the plaintiff. The plaintiff was also awarded damages equal to the amount of accumulated rent if unpaid, and the costs of the action. The defendant now appeals from that judgment.

The appellant is the owner of the premises known as 227 Church Street. He carried on the business of a restaurant and sale of tobacco on the first floor of the building and resided in the upper floor. He entered into an agreement with the respondent and the terms and conditions thereof are set forth in a letter addressed to the respondent under date 28th December 1942. It appears therefrom that the respondent agreed to purchase the business carried on by the appellant on the premises. It was stated that "at the same time" the respondent was to obtain "a lease of the property at 227 Church Street for a period of five years at a rental of \$110.00 per month during the first two years and \$120.00 per month during

the next three years, with an option to renew the same". Certain conditions are annexed to the agreement to lease the property, and I quote the following, as set forth in the letter:

"1. You [the respondent] are to sublet the upper floor thereof to Mr. Harakas (and to provide gas, water and electric light service and to heat the same) at \$20.00 per month."

By an addition to the letter, it is set forth, in handwriting, above the signatures of the parties:—

"The foregoing agreement is hereby amended as follows . . .

"(b) The right of Peter Harakas to occupy upper floor shall be limited to 2 years from closing, he to have right to terminate at any time on one month's notice."

An indenture dated the 4th day of January 1943, made in pursuance of The Short Forms of Leases Act, R.S.O. 1937, c. 159, between the appellant, therein called the lessor, and the respondent, called the lessee, recites, in part, that the lessor "has accepted the offer of the said Lessee to lease the said lands and premises". It stipulates that the demise and lease is "for the purpose of being used and occupied only by the Lessee and only as a restaurant and as a store for the sale of food and tobaccos". The indenture contains the following paragraph:—

"(6) The said Lessor shall have the right to continue to reside in and to occupy the upper floor of the said building (and to enjoy free and uninterrupted access thereto and therefrom) and, during such residence and occupation, to be supplied, by and at the expense of the said Lessee, with such heat, gas, electricity and water as may be required by the said Lessor—for a period commencing on the date hereof and terminating on the 4th day of January 1945, or prior thereto (upon one month's written notice of termination by the said Lessor to the said Lessee) on the 4th day of any calendar month before January 1945; and, during such period, the said Lessee shall permit and allow such residence and occupation and, at his own expense, shall supply the said Lessor with such heat, gas, electricity and water as aforesaid—in consideration of all which, the said Lessee shall have the right, monthly and every month, during such period, to deduct the sum of \$20.00 from each monthly payment of rent payable by him to the said Lessor."

On 28th July 1944, the respondent sent a letter to the appellant notifying him to "vacate, quit and deliver up vacant

possession" of the upper floor of the building on the 4th January 1945, "pursuant to the provisions of paragraph 6 of the lease dated the 4th day of January, 1943." The respondent was informed by a letter from the appellant's solicitors, dated 6th October 1944, that it was necessary for the appellant to take advantage of the rental regulations of the Wartime Prices and Trade Board, and that the appellant was entitled to remain in possession of the premises until 30th April 1945.

8th November 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW JJ.A.

Clifford H. Howard, for the defendant, appellant: The appellant, as a sub-tenant, was entitled to the protection of the rental regulations of the Wartime Prices and Trade Board. The trial judge erred in finding that clause 6 of the lease merely gave the defendant a right to occupy the upper floor; he was not in the position of an owner reserving a portion of the leased premises; there was a sub-lease of the upper floor, which was "housing accommodation" as defined by Order 294 of the Wartime Prices and Trade Board ([1943] 3 C.W.O.R. 401). The relationship of landlord and tenant was established with respect to the upper floor: Williams, Canadian Law of Landlord and Tenant, 2nd ed. 1934, p. 1. The test is whether exclusive possession was given for a definite period. I refer to the definitions of "landlord" and "tenant" in s. 1 of Order 294, and also in ss. 1 and 2 of The Landlord and Tenant Act, R.S.O. 1937, c. 219, and to *Selby v. Greaves* (1868), 37 L.J.C.P. 251. The appellant here was not in the position of a mere licensee. A licence is, by its nature, revocable: Woodfall, Landlord and Tenant, 24th ed. 1939, pp. 6-9.

As to exclusive possession, see *Furnishers Ltd. v. Booth et al.*, [1933] 1 D.L.R. 54; *Naegele v. Oke* (1916), 37 O.L.R. 61, 31 D.L.R. 501; *Town of Brockville v. Dobbie and Ritchie*; *Town of Brockville v. Paramount Theatres Ltd.*, 64 O.L.R. 75, [1929] 3 D.L.R. 583.

If it is established that we were a tenant of the upper floor, then proper notice to vacate was not given, as provided by ss. 12-22 of Order 294. We never received a notice in the form prescribed by the Board, nor did the notice comply with the provisions as to time.

Charles Drukarsh, for the plaintiff, respondent: Clause 6 of the lease is the governing clause, and, pursuant to it, the defendant is an owner reserving to himself the right to remain in possession of the upper floor until the expiration of a fixed term. No tenancy was created between the parties in respect of the upper floor: Order 294 does not apply in this case in any event; this is clearly "commercial accommodation" within the provisions of Order 315 ([1943] 4 C.W.O.R. 818), as amended.

The lease is one of the building, subject to a definite reservation of the upper floor. *Doe d. Barker et al. v. Crosby* (1850), 7 U.C.Q.B. 202, is very similar to the case at bar.

Clifford H. Howard, in reply.

Cur. adv. vult.

19th December 1945. ROBERTSON C.J.O. agrees with GILLANDERS J.A.

GILLANDERS J.A.:—The facts are stated in the judgment of my brother Laidlaw and need not be repeated. The question to be decided is whether or not the appellant became a tenant of the respondent in respect of the upper floor of the premises concerned. This, I think, depends on whether or not what the appellant did was to except or reserve from his demise to the respondent the upper floor of the premises or the right to possession thereof.

"An exception is that by which the grantor excludes some part of that which he has already given, in order that it may not pass by the grant, but may be taken out of it and remain with himself. A valid exception operates immediately, and the subject of it does not pass to the grantee": *per* Lord Watson in *Cooper v. Stuart* (1889), 14 App. Cas. 286 at 289.

In my view, the provisions respecting the upper floor in question here constituted either an exception from the demise or a reservation (as being a right to occupy the upper floor for a limited time), and it is unnecessary for the purposes of this case to decide which term is properly applicable. In either view, the relationship of the appellant and the respondent in respect of the upper floor would not be that of landlord and tenant. The parties themselves, by the form of their dealings, have, in some respects, complicated and confused the real character of the transaction. In their agreement prior to the lease from the

appellant to the respondent, the parties contemplated a subletting of the upper floor by the respondent to the appellant with provision for certain services at a rental of \$20 per month. Having subsequently entered into a formal lease, that document alone must be looked at to determine the relationship between the parties, unless there is ambiguity in its provisions. A reading of that document, and particularly of those parts relating to the upper floor, does not in my view present any ambiguity in respect of the matters at issue here. It provides that the lessor (the appellant) shall have the right to continue to reside in and occupy the upper floor of the building. These words might not be thought as apt or express as, for example, "saving and excepting" or "reserving", but they plainly indicate that "the right to continue to reside in and to occupy" this part of the premises never passed from the appellant. It follows that the appellant's continued right of occupation is founded, not on anything granted by or derived from the respondent, but on the right of ownership and possession which he enjoyed prior to the lease and continued to enjoy thereafter. The further provision that the respondent during the period agreed upon "shall permit and allow such residence and occupation", and agrees to furnish certain services, however inappropriate it might be thought, still does not vest in the respondent any right to control or possession of the upper floor. That control and possession never passed from the appellant. The ordinary rights of a landlord would not seem applicable to the respondent in respect of this portion of the premises. The alleged rental provided is the deduction of the sum of \$20 from each monthly payment payable by the respondent to the appellant for the whole premises. The real effect of this provision is that during the period of the reservation the rental contemplated for the whole premises is reduced by the sum of \$20. Any remedy by way of distress for the collection of this monthly rent would, I think, not be available to the respondent.

The lease provides that during the residence and occupation of the appellant he is to be supplied at the expense of the lessee with such heat, gas, electricity and water as may be required by the lessor. At first I was inclined to think that this provision gave some weight to the view that the appellant held the upper floor as tenant of the respondent but, on consid-

eration, I think the agreement to furnish such services to the premises of the lessor as partial consideration for the letting of the demised premises is quite as consistent with one view as with the other. If the upper floor in question had never in any way been included or mentioned in the demise by the appellant, it might have been expected that the appellant would provide for such services being furnished to the living quarters on the second floor as part of the consideration for the letting of the remainder of the building.

Much reliance is placed by the appellant on the broad provisions of certain war orders and regulations, dealing with rentals and termination of leases, in force at the relevant times. These are: (a) Order 294 of the Wartime Prices and Trade Board ([1943] 2 C.W.O.R. 401), as amended by Orders 320 ([1943] 4 C.W.O.R. 827), 358 ([1944] 1 C.W.O.R. 180) and 459 ([1944] 4 C.W.O.R. 459); and (b) Order 315 ([1943] 4 C.W.O.R. 818), as amended by Orders 470 ([1945] 1 C.W.O.R. 43) and 478 ([1945] 1 C.W.O.R. 277).

It cannot be disputed that if the provisions of these Orders are applicable to the parties the respondent is not entitled to possession of the upper floor and the appellant should succeed. The question whether or not the Orders are applicable depends on whether or not the appellant became a "tenant" of the respondent as "landlord" of the upper floor within the defining provisions of the Orders. There was considerable argument as to whether the premises should be classified as "commercial accommodation" or "housing accommodation" within the meaning of the Orders in question, but it is unnecessary to express any opinion on that point in dealing with the question here involved. In both cases "landlord" is defined to mean "any person of whom another holds any right to the possession" of accommodation and "any person who lets or sub-lets or grants any leave and licence for the possession" of accommodation.

In my view, the definition, broad as it is, does not assist the appellant. The upper floor being excepted from the premises demised by the appellant, or the right to possession being reserved to the appellant, no right of possession passed to the respondent on which he could found any sub-lease or grant any leave and licence. It would seem essential first to find vested in the alleged landlord the right on which any lease, sub-lease or

leave and licence granted by him must be founded. "Tenant" is defined to mean "any person who holds possession of any . . . accommodation under any lease." This, I think, does not include the appellant. He at all times held possession of the upper floor by virtue of his own ownership. His continued possession of the upper floor was not held under any lease, but was simply the continued and uninterrupted possession which he had enjoyed and continued to enjoy as an owner in possession. Likewise, I think the definition of "lease" does not advance the appellant's position. "Lease" is defined to mean "any enforceable contract for the letting or sub-letting of any . . . accommodation or any leave and licence for the use of any . . . accommodation, whether such contract or leave and licence is made orally or in writing; and each of the verbs 'let', 'rent' and 'sub-let' shall have a corresponding extended meaning". Looking at the lease from the appellant to the respondent, which is the formal document on which the relationship of the parties depends, unless its terms are equivocal or its interpretation obscure, I think there is here no "contract for the letting or sub-letting" by the respondent to the appellant of the upper floor. The provision whereby the lessee (the respondent) is to "permit and allow such residence and occupation" lends more weight, I think, to the appellant's case than any other point because if his occupation of the upper floor could be said to be with the leave and licence of the respondent, he holds it under a lease. To support an effective leave and licence one must first find in the respondent the right to grant it. I think here the words, while inapt, must be read as confirming the right of continued and uninterrupted possession for a limited period reserved by the appellant to himself.

If the right of possession had at any time passed to the respondent, the situation would be quite different. In *Cooper v. Stuart, supra*, the provision being considered was a provision to resume possession of a portion of the lands at some time after possession had passed to the grantee. Lord Watson observes, at p. 290:—

"It is obvious that such a provision does not take effect immediately, it looks to the future . . . when put in force it takes effect in defeasance of the estate previously granted, but not as an exception."

Admittedly, one might have a lease of the whole premises and a sub-lease back of a portion thereof, and the parties might readily have made such an arrangement here, but in such a case one must find from the documents that the right to possession of the whole passed to and was vested in the lessee at least momentarily, and that the sub-lease was a re-grant of some rights which had already passed to the original lessee.

In the case at bar, the appellant having in his lease to the respondent retained to himself "the right to continue to reside in and occupy the upper floor", no right of possession at any relevant time passed to the respondent and, in my view, this is decisive of the issue here between the parties. I do not overlook the fact that it might be argued that the right of access to and from the upper floor, reserved in the lease from the appellant to the respondent, might be distinguished from the exception or reservation. It has been held that a right of way reserved to a lessor by a lease over demised lands is not strictly an exception or reservation, being neither parcel of the thing demised nor issuing out of it, but is strictly speaking an easement newly created by way of grant from the lessee: *The Durham and Sunderland Railway Company et al. v. Walker* (1842), 2 Q.B. 940, 114 E.R. 364. The matter is not of importance here, because any value attached to the right would seem wholly dependent on the right to occupy the upper floor.

The appeal should be dismissed with costs.

LIDLAW J.A. (*dissenting*) [after stating the facts as above]:—The rights of the parties depend upon the interpretation to be put upon certain war orders and regulations and, in particular, Order 294 (respecting maximum rentals and termination of leases for housing accommodation and shared accommodation) as amended by Orders 320, effective 1st October 1943, 358, effective 6th January 1944, 459, effective 30th November 1944; also Order 315 (respecting maximum rentals and termination of leases for commercial accommodation) as amended by Order 470, effective 2nd January 1945.

The learned judge was of opinion that the appellant "did not become a tenant within the meaning of the regulations", and that he was "in the position of an owner reserving a por-

tion of the leased premises for part of the term granted under the lease."

I think that it is not necessary to decide whether the upper floor of the building falls within the definition of "housing accommodation", and consequently is governed by the provisions of Order 294 and amending Orders, or is within the definition of "commercial accommodation" and governed by Order 315 and amending Orders. In respect of both classes of accommodation, it is expressly provided that "no tenant of any . . . accommodation shall be dispossessed of such accommodation or be evicted therefrom and no landlord shall demand that any tenant vacate or deliver up possession of any . . . accommodation", except as expressly provided in certain sections of the Orders: Order 294, s. 12: Order 315, s. 12, as added by Order 470, s. 5. It is admitted that the facts in this case do not fall within the exceptions. In particular, the required form and procedure to dispossess the appellant of the accommodation occupied by him was not adopted by the respondent. The question to be determined is whether the parties stood in the relationship to one another of landlord and tenant within the definition of those words as set forth in the Orders referred to. The word "tenant" is defined as meaning any person "who holds possession . . . under any lease": Order 294, s. 1(p); Order 315, s. 1(j). "Lease" means "any enforceable contract for the letting or sub-letting of any . . . accommodation or any leave and licence for the use of any . . . accommodation": Order 294, s. 1(i); Order 315, s. 1(e). Para. 6 of the indenture executed by the parties, quoted above, was no doubt intended by the parties to implement and carry out the obligation of the respondent "to sub-let the upper floor" to the appellant.

The agreement made between the parties provided that the respondent was to sublet "at \$20 per month." There was express provision in the agreement that the appellant would have the "right to terminate" the term of occupancy. Objection might well be taken that para. 6 of the indenture of lease quoted above should not be construed in law as a lease under which the appellant became a tenant, and the respondent a landlord. But it was understood by both of them that the appellant would occupy and use the accommodation by virtue of and in accordance

with the obligation of the respondent to sublet it to him. In any event the appellant had the use of the accommodation, in my opinion, by "leave and licence" from the respondent. The respondent cannot say there was no sub-lease from him to the appellant, or that the appellant did not occupy the upper floor by his leave and licence. I conclude, therefore, that the appellant was a tenant within the meaning of that word as set forth in Orders 294 and 315, *supra*. Likewise, I am of the opinion that the respondent was a landlord within the definition of that word as given in those Orders. As therein set forth "landlord" means any person of whom another holds any right to the possession of any place of dwelling (or commercial accommodation as the case may be) and includes any person who lets or sublets or grants any leave or licence for the possession of any accommodation: Order 294, s. 1(h); Order 315, s. 1(d).

I am of opinion that the appellant is entitled to rely upon the provision of s. 12 of Order 294, if the upper floor of the premises in question be "housing accommodation", or upon s. 12 of Order 315, if the upper floor be "commercial accommodation", and that by virtue of these provisions he cannot be dispossessed of this accommodation of whatever class it may be.

The appeal must therefore be allowed. The judgment in the Court below should be set aside, and in place thereof judgment should be entered dismissing the action. The appellant is entitled to the costs of this appeal and of the action.

Appeal dismissed with costs, LAIDLAW J.A. dissenting.

Solicitor for the plaintiff, respondent: E. J. Murphy, Toronto.

Solicitors for the defendant, appellant: German, Howard & Rapoport, Toronto.

[LEBEL J.]

Re Thompson.

Military Law—Punishment of Offenders—Jurisdiction of Court-martial—Investigation by Commanding Officer—Delay—The Army Act, 1881 (Imp.), c. 58—Rules of Procedure—The Militia Act, R.S.C. 1927, c. 132, s. 69(1).

Where a soldier or officer seeks to enforce fundamental common law rights, such as immunity of person or liberty, then, save in so far as such rights have been taken away by military law, they may be asserted in the civil courts. But a civil court should not apply the same rigorous tests applicable in reviewing the acts of civil courts of summary jurisdiction; a reasonable latitude should be allowed, and mere mistakes of procedure, if jurisdiction in fact exists, should not receive undue weight. *In re Mansergh* (1861), 1 B. & S. 400; *Heddon v. Evans* (1919), 35 T.L.R. 642; *Rex ex rel. Peters v. Harrison et al.* (1944), 52 Man. R. 28; *Ex parte Fogan* (1919), 46 N.B.R. 370, referred to.

By the combined effect of s. 46(1) of The Army Act (Imp.) and Rules of Procedure 2, 3(A), 4(A) and 4(B), it is an essential preliminary to the trial of a soldier by court-martial that the charge against him should first have been "investigated" by his commanding officer, and the "investigation" contemplated is a judicial hearing, at which the accused soldier is present and is given an opportunity of being heard. The commanding officer has a discretion, after this investigation, to dismiss the charge summarily, and if he fails to exercise his discretion, following the proper procedure, there is no jurisdiction in a court-martial convened at his request. The reading by the commanding officer of the record of the proceedings of a court of inquiry is not a sufficient compliance with the requirements.

Further, it is only the accused soldier's commanding officer who may remand him for trial by court-martial, and he can do this only after considering the summary of evidence prepared after the investigation above referred to. He is again required to exercise a discretion after the return of this summary, and accordingly if the investigation has not been held, and there is accordingly no summary of evidence, there cannot be a valid remand for trial by court-martial.

In the absence of reasonable explanation, a delay of more than two months in proceeding with charges against an accused soldier, after his arrest, will of itself be ground for ordering his discharge from military custody. *Blake's Case* (1814), 2 M. & S. 428, distinguished.

AN APPLICATION for discharge from custody.

12th October 1945. The motion was heard by LEBEL J. in chambers at Toronto.

H. M. Rogers, for the applicant.

G. B. Bagwell, for the Minister of Justice, *contra*.

21st December 1945. LEBEL J.:—This is a motion, on the return of a writ of *habeas corpus ad subjiciendum* with *certiorari* in aid, for the discharge of the applicant, who is a non-commissioned officer in His Majesty's forces presently detained in military custody at No. 84 Detention Barracks, Camp Niagara, Niagara-on-the-Lake, on charges under The Army Act, 1881 (Imp.), c. 58.

The first charge contained in the formal charge sheet is that between the 25th day of March and the 2nd day of June 1945, contrary to s. 18(4) of the said Act, the applicant stole public property. The second charge, laid in the alternative, is that, contrary to s. 40, he is guilty of conduct to the prejudice of good order and military discipline in that, at the residence of one Thomas E. Moore, R.R. No. 1, Fort Erie North, on the 20th day of June 1945, he was improperly in possession of the same public property. The third charge is that, contrary to the same s. 40, he is guilty of similar conduct in that he was on the same date and place improperly in possession of other public property.

It is common ground that the applicant is subject to military law, and that the offences with which he stands charged are within the competence of a military tribunal to try, but counsel for the applicant based his client's claim for discharge from custody upon the ground that he was, on the return of the writ, being detained in the said barracks without order of competent authority, and further, that the district court-martial convened by order signed on 6th September 1945 by Lt.-Col. M. H. A. Drury, the Assistant Adjutant and Quartermaster General of Military District No. 2, was upon assembly, and still is, without jurisdiction to try and dispose of the said charges.

Many objections were taken in the applicant's petition to the procedure followed by the military authorities after his arrest—by his commanding officer, in particular—and to the steps which led to the convening of the court-martial, and they were argued at some length before me, but in view of the conclusions I have reached, it is unnecessary to deal with most of them. These objections were in substance the same as were taken, without avail, by counsel for the applicant before the court-martial. That tribunal heard evidence tendered by the applicant as to the question of its jurisdiction, and ruled adversely to the applicant upon that point before its proceedings were interrupted by the applicant's motion to this Court for his discharge. The applicant is still in custody and the said charges against him await final disposition.

At the outset it should be said that if the rights which an officer or soldier is seeking to enforce are fundamental common

law rights—such as immunity of person or liberty—then, save in so far as they may be taken away by military law, they may be asserted in the civil courts. But it should be added that a civil court ought not to apply the rigorous tests sometimes applied in questioning acts of civil courts of summary jurisdiction. A reasonable latitude should be allowed, and mere mistakes of procedure *if actual jurisdiction exists*, ought not to receive undue weight: see *In re Mansergh* (1861), 1 B. & S. 400, 121 E.R. 764; *Heddon v. Evans* (1919), 35 T.L.R. 642; *Rex ex rel. Peters v. Harrison et al.*, 52 Man. R. 28, 81 C.C.C. 215, [1944] 1 W.W.R. 353, [1944] 2 D.L.R. 597, and *Ex parte Fogan* (1919), 46 N.B.R. 370, 48 D.L.R. 194 at 196-7. In the case at bar the liberty of the applicant is undoubtedly involved.

While an application for a writ of *habeas corpus* is unusual before an adjudication, yet, as stated in *The United States of America v. Gaynor et al.*, [1905] A.C. 128 at 136, C.R. [13] A.C. 382, 9 C.C.C. 205 (*sub nom. Re Gaynor and Greene*) there may be circumstances in which such a writ may be proper. There can be no doubt but that a prisoner is entitled to relief if he is illegally imprisoned, for the object of the writ of *habeas corpus ad subjiciendum* since Magna Carta (see *Thomlinson's case* (1605), 12 Co. Rep. 104, 77 E.R. 1379) is to deliver from confinement anyone who is so held. Therefore, the sole question which I have to determine on an application of this kind is whether or not the applicant was in lawful custody on the date of the return of the writ, *i.e.*, on the date the argument was heard by me: *Rex v. Mitchell* (1911), 24 O.L.R. 324, 19 C.C.C. 113.

It is here perhaps convenient to refer briefly to the sources of military law applicable to officers and soldiers in the Canadian army. These together may be said, speaking generally, to comprise the Canadian "Military Code". By s. 91(7) of The British North America Act, the exclusive legislative authority of the Parliament of Canada extends to all matters concerning militia, military and naval service and defence. The Militia Act, R.S.C. 1927, c. 132, has been said to be the corner-stone of Canadian military law. By s. 69(1) of that Act it is provided that "The *Army Act* for the time being in force in Great Britain, the King's Regulations, and all other laws applicable to His Majesty's troops in Canada and not in-

consistent with this Act or the regulations made hereunder, shall have force and effect as if they had been enacted by the Parliament of Canada for the government of the Militia." This section, with the limitations therein mentioned, incorporates into the code of Canadian military law the military law of Great Britain, more particularly The Army Act, 44 & 45 Vict. (Imp.), c. 58, the King's Regulations for the Army and the Army Reserve, the Rules of Procedure (sometimes abbreviated as R.P.) and the Customs of the Service. By authority of ss. 139-141 of The Militia Act the Governor in Council may make regulations for the organization, discipline, efficiency and good government generally of the militia. By virtue of this power, regulations have been made which are known as the King's Regulations and Orders for the Canadian Militia, abbreviated as K.R. (Can.).

The facts are set out in the affidavit of Major P. J. Flynn, Assistant Judge Advocate-General, Military District No. 2. I do not consider it necessary to deal with Mr. Rogers's objection as to its admissibility on the ground that it contravenes Rule 293 of the Rules of Practice of this Court. The essential facts, as stated by Major Flynn, are as follows: The applicant was, on 30th June 1945, and still is, a corporal on active service, and is a member of a detachment of No. 2 Company, Royal Canadian Electrical Mechanical Engineers (R.C.E.M.E.), which detachment is under the command of Capt. C. P. Roberts. He was, on the said date, placed under arrest by order of Major Sutcliffe, the Assistant Adjutant and Quartermaster General of Niagara Camp, Niagara-on-the-Lake, on the charge of theft under s. 18(4) of The Army Act, and immediately confined in the said barracks. Major G. R. Turner, the officer commanding No. 2 Company, R.C.E.M.E., and hence the applicant's commanding officer at the time, had previously convened a court of inquiry to inquire into the loss of certain welding equipment missing from the garage of his unit. The said court of inquiry was completed on 22nd June 1945, but was reconvened to hear further evidence on 5th July 1945. In the meantime, on 2nd July 1945, the applicant was released from custody without prejudice to re-arrest (which is permissible under military law), but was re-arrested on the same day by Capt. W. E. Duffy of the Canadian Provost Corps, acting on the instructions of Major Turner, presumably on the first

charge of improper possession under s. 40 of The Army Act. The applicant has remained in custody ever since that date. Major Turner read and considered the proceedings of the court of inquiry, and endorsed thereon his recommendation that the applicant be brought to a district court-martial. At the request of Major Turner, Military Headquarters M.D. 2, on 16th July 1945 detailed Capt. F. G. Foster, Permanent Prosecutor for M.D. 2, to proceed to Niagara Camp and take a formal summary of evidence. This summary of evidence was completed on 1st August 1945. Some delay was experienced owing to the absence of certain witnesses from Niagara Camp on furlough. The completed summary of evidence was read and considered by Major A. R. Miller, who had replaced Major Turner on or about the 28th July as the applicant's commanding officer, and Major Miller decided that the accused should be sent to court-martial and signed a formal application to that effect to the District Officer Commanding M.D. 2 on the 10th August 1945. On 14th August 1945, the said District Officer Commanding sent Major Miller's application, a formal charge sheet, and the summary of evidence to National Defence Headquarters, Ottawa, to be there considered by higher authority under the provisions of K.R. (Can.), s. 525(i), for direction as to whether the accused should be tried by a court-martial or by a civil criminal court. The documents were considered by the Judge Advocate-General at National Defence Headquarters and were returned to the District Officer Commanding M.D. 2 on 5th September 1945. Apparently the Judge Advocate-General approved Major Miller's application for court-martial, but suggested that the formal charge sheet be amended so that the three charges set forth above, including the original theft charge under s. 18(4), might be dealt with. On 6th September 1945 the convening order for the district court-martial of the applicant at Niagara Camp on 11th September was issued by Lt.-Col. Drury, and Capt. Foster proceeded to the said camp as prosecutor. At the opening of the trial Mr. Rogers raised the question of the court-martial's jurisdiction. As has been stated, evidence was then called on behalf of the applicant, but the prosecutor tendered no evidence. After hearing argument the court-martial ruled that it had jurisdiction, but counsel for the applicant refused to allow his client to plead and informed the President that he proposed to launch a motion to this Court for his client's discharge.

The court-martial thereupon adjourned until 3rd October 1945. Upon its re-convening on that date, counsel for the applicant served the President and the keeper of No. 84 barracks with notice of his motion for a writ of *habeas corpus*, and the court-martial suspended proceedings pending the outcome of this motion.

The writs of *habeas corpus* and of *certiorari* were issued by order of Mr. Justice Hogg and were returned before me on 12th October 1945.

If any doubt could exist as to the lawful detention of the applicant at the time of the return of the writ of *habeas corpus*, there could be none as to the legality of his arrest on 30th June and his re-arrest on 2nd July. Section 45(1) of The Army Act provides that "Every person subject to military law when so charged may be taken into military custody". The charge here referred to is the charge or complaint mentioned in Rules of Procedure, 3, 4, and 8, and is distinct from the more formal charge referred to in R.P. 11(B). The applicant was duly charged. By subs. 4 of the said s. 45, "An officer or non-commissioned officer commanding a guard . . . shall not refuse to receive or keep any person committed to his custody by any officer or non-commissioned officer".

It now seems necessary before dealing with certain provisions of the "Military Code" with respect to the trial and detention of a soldier, to set out certain parts of such provisions at length. (The italics are mine.)

Section 46(1) of The Army Act reads as follows: "*The commanding officer shall, upon an investigation being had of a charge made against a person subject to military law under his command of having committed an offence under this Act, dismiss the charge, if he in his discretion thinks that it ought not to be proceeded with, but where he thinks the charge ought to be proceeded with, he may take steps for bringing the offender to court-martial, . . . or in the case of a soldier may deal with the case summarily.*"

Section 46(7) reads: "An offender shall *not* be liable to be tried by court-martial where the charge has been dismissed or the offence has been dealt with summarily".

Rules of Procedure 2, 3(A), 4(A) and 4(B) read thus:

"2. Every commanding officer will take care that a person under his command, when charged with an offence, is not detained

in custody *for more than forty-eight hours* after the committal of that person into custody is reported to him, without the charge being *investigated*, unless investigation within that period seems to him to be impracticable with due regard to the public service. Every case of a person being detained in custody beyond a period of forty-eight hours, and the reason thereof, shall be reported by the commanding officer to the general or other officer to whom application would be made to convene a court-martial for the trial of the person charged."

"3.—(A) Every charge against a soldier will be heard in the presence of the accused. The accused will have full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defence."

"4.—(A) The commanding officer will dismiss a charge brought before him if in his opinion the evidence does not show that some offence under the Army Act has been committed, *or if, in his discretion, he thinks that the charge ought not to be proceeded with.*

"(B) At the conclusion of the hearing of a charge, if the commanding officer is of opinion that the charge ought to be proceeded with, he shall, without unnecessary delay, either—

"(i) dispose of the case summarily; or

"(ii) refer the case to the proper superior military authority; or

"(iii) adjourn the case for the purpose of having the evidence reduced to writing.

Provided that the commanding officer shall not dispose of a case summarily unless the accused is a soldier, or if the accused, being a soldier, has elected (under Section 46 of the Army Act) to be tried by a district court-martial."

It will be observed that the word "investigation" appearing in s. 46, and the word "investigated" in R.P. 2, can only refer to a hearing of the charge in a judicial sense by the commanding officer in the presence of the accused, because the accused is entitled to make a statement in his defence, to cross-examine adverse witnesses, and to call witnesses on his own behalf. "Investigation" clearly does not refer then to the type of investigation which is carried out by civil police following the commission of a crime. Section 46 requires the officer commanding personally to see the soldier who is in custody—he is usually paraded before

him—within forty-eight hours after the committal into custody is reported to him, unless “it seems to him to be impracticable with due regard to the public service” to conduct the hearing within that period.

It will also be observed from a perusal of s. 46 that the officer commanding, following the hearing before him, may dismiss the charge, if he, in his *discretion*, thinks it ought not to be proceeded with, and, in my opinion, that is so regardless of the magnitude of the charge. While the footnotes or annotations appearing in the Manual of Military Law have not the force of law, it is of interest to note that footnote 2 appearing under R.P. 4 on p. 618 of the said Manual, reads: “He [the officer commanding] may dismiss it [the charge] if he considers, for example, that the evidence is doubtful or the case trivial, or, in the exercise of his discretion, for any reason, *e.g.*, the good character of the accused.” The footnote is fully justified, in my opinion, unless one is to neglect the import of the words “if he in his discretion thinks that it ought not to be proceeded with.” And it is clearly only where the officer commanding thinks that the charge ought to be proceeded with, and hence does not dismiss it, that “he may take steps for bringing the offender to court-martial.” It will also be noted that s. 46(7) prohibits trial by court-martial where the officer commanding dismisses the charge in the exercise of the discretion which is wholly his.

It was admitted by Mr. Bagwell, counsel for the Minister of Justice, that no such investigation or hearing as is contemplated by s. 46 and R.P. 2 was had by either Major Turner or Major Miller or any other officer, and the return to the writ is devoid of anything tending to show why a hearing within the period mentioned was impracticable. The applicant swore in the court-martial proceedings that since the date of his arrest he had not seen either of his successive commanding officers, and neither officer testified to the contrary before the court-martial. Captain Roberts, the officer commanding the applicant's detachment, did see him, but without considering that officer's limited powers—which depend to some extent upon his rank, upon whether he is on active service or not, and other considerations—it is clear, from his affidavit filed in these proceedings and from a perusal of the record of the proceedings before the court-martial, that he conducted no such hearing. In any case, however, I am satisfied that

“officer commanding” in the section and Rules set out above refers to Major Turner before 28th July 1945 and Major Miller after that date.

The objection to the jurisdiction of the court-martial is, to my mind, a very serious one, for the force of that tribunal's powers is conditioned upon a prior investigation or hearing of the kind described, followed by an unfettered exercise of the commanding officer's discretion. Indeed, unless there is a hearing of the charge by the officer commanding in the presence of the offender, and the offender is afforded full opportunity to be heard, upon what basis in fact could the officer commanding possibly exercise his discretion? Clearly the offender must be heard, and in the present case, who can say that if the applicant had been heard his commanding officer would not have dismissed the charge? Courts, of course, must draw a distinction between what is merely irregular and what is of such a character as to be of substance. But in my view the spirit as well as the frame of the section and Rules referred to evinces the intention that the hearing, followed by the exercise of the commanding officer's discretion, is mandatory, and as a result, the court-martial is without jurisdiction in the case at bar.

Mr. Bagwell contended that since Major Turner had read the record of the proceedings of the court of inquiry before recommending court-martial, and Major Miller had later read the summary of evidence before applying to the District Officer Commanding for court-martial, both officers must be taken to have decided against a dismissal of the charge. But this contention can be dealt with succinctly, for obviously neither officer was entitled to recommend or apply for or “take any steps” for bringing the applicant to court-martial until after he had “investigated” the charge. Moreover, the record of the court of inquiry could not be used since R.P. 125A(G) prevents its use for this purpose, and the summary of evidence is a thing of naught because it was ordered by Major Turner pursuant to R.P. 4(B) (iii) before any “investigation” was had.

It does not follow, of course, that because the district court-martial which convened to try the charges against the applicant was, and is, without jurisdiction for the reasons indicated, the applicant's detention in the said military barracks was unlawful

at the date of the return of the writ, and I now proceed to deal with the important matter of his detention.

Following the applicant's re-arrest on 2nd July he was visited almost daily by the camp orderly officer, or by Captain Roberts, and was remanded for either twenty-four hours or forty-eight hours, depending on whether the remand was made over a week-end. It was contended by counsel for the applicant that the military authorities had lost jurisdiction in the matter, because on three occasions there had been a failure on the part of anyone to see his client and remand him for twenty-four hours, but this contention does not strike me as being sound, for the failure mentioned would not, in my opinion, amount to more than an error or irregularity in procedure. It could not go to the legality of his detention. Finally, on 8th September, according to an entry in the book kept by the camp orderly officer, which was produced on the return of the writ, one Lieut. Shadlow, the orderly officer of the day, remanded the applicant until 11th September, the day fixed for the assembly of the court-martial. From a perusal of the record of the proceedings before that tribunal, it also appears that both Major Sutcliffe and Captain Roberts, while somewhat indefinite about the nature of their remands, swore that they had remanded the applicant for court-martial. Now, in these circumstances, it is essential to know whether any of the three officers mentioned had any authority to remand the applicant for court-martial. That it was the intention of some one that he should be remanded for such purpose is beyond dispute, in view of the convening order signed by Lt.-Col. Drury, and of the applicant's appearance before the court-martial, as directed by that order.

From a perusal of R.P. 4(B), the material part of which is set forth above, it will have been noticed that following the hearing of the charge, the commanding officer may, in accordance with para. (iii) of the said subsection, "adjourn the case for the purpose of having the evidence reduced to writing." Then, R.P. 5(A) and (B) read as follows:

"5.—(A) The evidence and statement (if any) taken down in writing in pursuance of Rule 4 (in these rules referred to as the summary of evidence) shall be considered by the commanding officer, who thereupon shall either—

“(i) remand the accused for trial by court-martial; or

“(ii) refer the case to the proper superior military authority;

or

“(iii) if he thinks it desirable, and the accused is a soldier and has not himself elected to be tried by a district court-martial, rehear the case and dispose of it summarily.

“(B) If the accused is remanded for trial by court-martial, the commanding officer shall without unnecessary delay apply to the proper military authority to convene a court-martial. Any delay in the reference to superior military authority should not ordinarily exceed thirty-six hours.”

It will be observed from the above Rule that the officer commanding is again required to exercise his discretion following the return to him of the summary of evidence. If the offender has not already elected to be tried by court-martial, as he may do under s. 46 of The Army Act and under the terms of the proviso in R.P. 4(A), the officer commanding may (i) remand the accused for trial by court-martial, (ii) refer the case to superior authority, or (iii) if he thinks it desirable, rehear the case and dispose of it summarily. It will also be noted particularly that it is the soldier's commanding officer, and no other, who may remand him for court-martial, and it is therefore clear that not one of the three officers who claimed to have so remanded the applicant had the necessary authority, unless, perhaps, they meant to be understood as saying that they had acted on the instructions of either Major Turner or Major Miller. They did not specifically say that they had so acted, but in any event, I have no doubt whatever but that neither of the officers commanding possessed the power in the instant case to remand the applicant for court-martial, and hence that any attempted remand on the part of either or both was a nullity. To acquire such power either officer commanding, after “investigating” the charge against the applicant, would have had to order a summary of evidence, and following its perusal, would have had to decide to send the applicant to court-martial. For failing to exercise his discretion in both instances as necessary steps to court-martial, neither officer commanding was lawfully entitled to remand the applicant for such purpose. It follows that the applicant is entitled to be discharged.

As a further ground for discharge, counsel for the applicant contended that long delay in bringing his client to court-martial,

and particularly his commanding officer's refusal or neglect to accord him the right to be heard over a period of some two and one-half months, ousted the jurisdiction of a military tribunal to deal with the alleged offences. This contention, although novel, has, in my view, much force, if one considers the circumstances of this case and notes that little or no explanation appears to have been advanced by the military authorities for failure on the part of the commanding officers to investigate the charge against the applicant. The interval required to bring the applicant to court-martial has perhaps been explained, even though it is rather hard to understand the necessity for keeping the applicant in close custody all the while, but it seems to me, at any rate, that there could be no valid excuse for depriving the applicant, for the long period mentioned, of his right to be heard by his commanding officer and of his chance to have the charge against him summarily dismissed. To feel otherwise is to ignore the time limitation of forty-eight hours prescribed by R.P. 2.

The question of delay in a case somewhat similar to this was considered in 1814 in *Blake's case*, 2 M. & S. 428, 105 E.R. 440. In that case the Court held that the delay was not fatal, but the lapse of time there considered was with respect to the offenders' being brought to court-martial, and reasons for delay were advanced by the military authorities which were there considered good and sufficient. No authority has been referred to me, and I am unable to find any, which deals with delay on the part of the commanding officer in the holding of his investigation into charges against a soldier under his command, or in which plausible reasons for delay have not been given to the Court.

All that is before me here in the matter of delay is contained in para. 19 of Major Flynn's affidavit, and he must be taken to be speaking only of delay in bringing the applicant to court-martial, for he makes no attempt to defend the absence of the commanding officer's investigation. He does say in general terms that delay was in part due to the "consideration which had to be given by responsible officers to every phase of the preliminary steps to bring the accused to trial", but it appears clear, for the reasons I have stated, that he could not have intended to include Major Turner or Major Miller in the words "responsible officers". Major Flynn also speaks of difficulty in securing witnesses, but that could not be a valid excuse on the part of either officer commanding for

not proceeding with his investigation. If there were witnesses who were unavailable, the applicant's arrest should have awaited production of the witnesses, or if the attendance of witnesses could not have been obtained for any reason, and the applicant had been placed in close custody, he should have been released without prejudice to his arrest later. It was said in argument that the successive commanding officers were stationed at Toronto, some little distance from Camp Niagara, but that surely is no valid reason for ignoring the provisions of military law, which I have found to be mandatory.

I have concluded that the failure to hold the investigation mentioned for well over two months, while the applicant was held in close arrest, affords a further ground for ordering his release. In reaching this conclusion I am partly influenced by the view I would entertain as to the validity of any conviction upon the said charges which might now be made by a court-martial. Since, before making the required investigation, the applicant's commanding officers have referred the charges to superior authority, and an order convening a district court-martial has followed, how can it be argued, with reason, that the applicant's present commanding officer might now give consideration to the charges with such detached and unfettered mind as might justify him in summarily dismissing them? I am satisfied that there was nothing deliberate or wanton on the part of anyone in connection with the applicant's detention, but I have concluded that it was excessive, and for that reason, as well as the others I have mentioned, he should be discharged from military custody, and I so order.

Applicant discharged.

Solicitors for the applicant: Bench, Keogh, Rogers & Grass, St. Catharines.

Solicitors for the Minister of Justice, respondent: Roebuck, Bagwell, McFarlane & Walkinshaw, Toronto.

[COURT OF APPEAL.]

Greenlees v. Attorney-General for Canada.

War Measures—Compulsory Military Training—Exemptions “Minister of a Religious Denomination”—Jehovah’s Witnesses—The National Selective Service Mobilization Regulations, 1944, s. 3(2)(c).

A member of the group of persons known as “Jehovah’s Witnesses” is not “a minister of a religious denomination” within the meaning of s. 3(2)(c) of The National Selective Service Mobilization Regulations, 1944, and is therefore not exempt from the operation of the Regulations.

Even assuming that “Jehovah’s Witnesses” constitute “a religious denomination”, the word “minister” as used in the Regulations cannot extend to and include all such persons as are members of the denomination. Further, however, it appears that “Jehovah’s Witnesses”, while the word “religious” in the Regulations may properly be applied to them, do not constitute a “denomination” as that word is there used.

Judgment of Hogg J., [1945] O.R. 411, affirmed.

AN APPEAL by the plaintiff from the judgment of Hogg J., [1945] O.R. 411, [1945] 2 D.L.R. 641, 808, dismissing the action.

4th, 5th and 9th October 1945. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and GREENE JJ.A.

J. J. Robinette, K.C., for the defendant, respondent, on a preliminary objection: The plaintiff is not entitled to a declaratory judgment against the Attorney-General for Canada in this case. The action is merely an attempt to forestall a prosecution for breach of the National Selective Service Mobilization Regulations, 1944 ([1944] 1 C.W.O.R. 566). The property or revenue of the Crown is not affected, which distinguishes the case from *Dyson v. Attorney-General*, [1911] 1 K.B. 410. The Exchequer Court has sole jurisdiction under ss. 18 and 19 of The Exchequer Court Act, R.S.C. 1927, c. 34: *Smith v. Attorney-General for Ontario* (1922), 52 O.L.R. 469; *Attorney-General for Ontario v. Russell* (1921), 49 O.L.R. 103, 64 D.L.R. 59. A declaratory judgment should not be granted unless the plaintiff is entitled to consequential relief: *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Limited*, [1921] 2 A.C. 438 at 445, 452; *Mutrie v. Alexander* (1911), 23 O.L.R. 396.

[ROBERTSON C.J.O.: The Crown has presumably an interest in the matter, even though it is not a property interest.] The Crown is interested in the maintenance of an adequate defence force. Even if a declaration were granted in this action, there would be nothing to stop anyone from laying an information before a magistrate. *Dyson v. Attorney-General*, *supra*, is dis-

tinguishable from *Smeeton v. Attorney-General*, [1920] 1 Ch. 85. In this case, as in the *Smeeton* case, the rights of the plaintiff alone are in question. There is no evidence here, as there was in the *Dyson* case, that large numbers of other persons are in a similar position. The Court is being asked to make a declaration *in vacuo*, and a dangerous result would follow if the plaintiff succeeded. All later cases point out the danger of extending the principle of the *Dyson* case.

W. Glen How, for the plaintiff, appellant, on the preliminary objection: The action is not within the jurisdiction of the Exchequer Court. The matter is one of great public importance to a large number of people, whose civil liberties are at stake. This Court has jurisdiction under s. 15(b) of The Judicature Act, R.S.O. 1937, c. 100, whether or not consequential relief is or could be claimed, and that section should be liberally construed. The fact that a judgment in this action would enable us successfully to defend a prosecution is not a ground for refusing us relief. The Attorney-General for Canada is a proper and necessary party as defendant, and a declaration that the Regulations are invalid may properly be made in the action as constituted.

The action may be maintained without a *fiat*: *Dyson v. Attorney-General*, *supra*, at p. 424; see also *Dyson v. Attorney-General*, [1912] 1 Ch. 158 at 168. [ROBERTSON C.J.O.: It has been frequently said that the principle of the *Dyson* case should not be extended.] I rely on *Ruislip-Northwood Urban District Council v. Lee et al.* (1931), 145 L.T. 208; *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Limited*, [1921] 2 A.C. 438; *Guaranty Trust Company of New York v. Hannay & Company*, [1915] 2 K.B. 536. [ROBERTSON C.J.O.: There must be some limit to the Court's power to make a declaration of right.] [HENDERSON J.A.: If the plaintiff is not subject to the Regulations, he cannot be successfully prosecuted. It is not the function of this Court to make a declaration as to his rights.] I rely also on *Australian Alliance Assurance Co. Ltd. v. Attorney-General of Queensland*, [1916] St. R. Qd. 135 at 176.

The Court reserved judgment on the preliminary objection, and directed counsel to proceed with the argument of the appeal.

W. Glen How, for the plaintiff, appellant: The trial judge should have found that the plaintiff was a "minister of a religious denomination", within the meaning of the Regulations. The acts and appointments of the American corporations are in fact acts of, and done on behalf of, the organization of Jehovah's Witnesses. The facts used to support the argument that Jehovah's Witnesses are not a religious denomination are equally applicable to a number of recognized groups whose position has never been questioned: see *Episcopal Corporation of Saskatoon v. City of Saskatoon*, [1936] 2 W.W.R. 91. The same principles should have been applied in *Saltmarsh v. Adair*, [1942] S.C. (J.) 58. A religious denomination may operate through a corporation bearing an entirely different name. Jehovah's Witnesses were held to be a religious denomination in *Murdock v. Pennsylvania (City of Jeannette)* (1943), 319 U.S. 105. What must be considered is the true nature of the total entity, including both the corporate and the unincorporated parts: *Follett v. Town of McCormick* (1944), 321 U.S. 573; *United States ex rel. Hull v. Stalter* (1945), 61 Fed. Supp. 732. [HENDERSON J.A.: The plaintiff may be a "minister" as that term is used by Jehovah's Witnesses, but that does not necessarily make him a "minister" within the Regulations. The analogy with the American cases seems doubtful.] [ROBERTSON C.J.O.: We must consider whether the corporation controls the denomination or whether the denomination controls the corporation.]

A religious denomination does not require a grant of temporal authority. In *Saltmarsh v. Adair, supra*, the Court dealt almost exclusively with the fact that the corporation was an unlimited private company; this has been held to be wholly immaterial in the United States: *Klix et al. v. Polish Roman Catholic St. Stanislaus Parish et al.* (1909), 118 S.W. 1171.

As to the appellant's appointment as a minister, the permanency of such appointment, and problems of organization generally, I refer to *Offord et al. v. Hiscock* (1917), 86 L.J.K.B. 941; *Re Bien and Cooke*, [1944] 1 W.W.R. 237, 81 C.C.C. 316, [1944] 2 D.L.R. 187. The dictionary definitions of "minister" and the common understanding of that term, are by no means exhaustive of the types of ministers or clergymen who must be recognized by law if effect is to be given to the terms and intent of the Regulations herein, in accordance with recognized prin-

ciples of law. [HENDERSON J.A.: If you say you are not a religious denomination, you cannot be heard to claim the privileges of such a denomination.] The narrow use of the word "religion" in explanation of a Biblical concept, as contrasted with its use in a statute, has been considered in several cases involving Jehovah's Witnesses: *Borchert et al. v. City of Ranger, Tex. et al.* (1941), 42 Fed. Supp. 577; *Lynch et al. v. City of Muskogee* (1942), 47 Fed. Supp. 589. These cases recognize that Jehovah's Witnesses give a limited meaning to the word "religion" for their own purposes, but that the Court must consider the legal meaning of the word and apply it to the beliefs and practices of Jehovah's Witnesses, irrespective of their own repudiation of the term.

[ROBERTSON C.J.O.: What constitutes a "denomination"?] We become a denomination in that we are separate and apart from other groups, having a separate organization and principles of operation. [ROBERTSON C.J.O.: The most important part of this discussion is as to the meaning of that word. Anyone claiming the benefit of the exemption must show clearly that he comes within it.] We must recognize the intention of the Regulations to make provision for all sects, no matter how small. The facts clearly demonstrate that the plaintiff is within the exemption. The word "minister" is discussed in *Simmonds v. Elliott*, [1917] 2 K.B. 894. [ROBERTSON C.J.O.: But it is somewhat against your contention that every member of the group is called a minister.] I refer to the judgment of Viscount Reading in *Kipps v. Lane* (1917), 86 L.J.K.B. 735. If the *Kipps* case was close to the border-line, this case is far beyond it. The test applied by the Court in that case was that it was a question of degree. The plaintiff here is as high in authority as any one of Jehovah's Witnesses can be. If there is a religious denomination, it must have some ministers, and if Jehovah's Witnesses, as a denomination, have any ministers, then the plaintiff is one of them. Before the Court can hold that the plaintiff is not within the exemption, the Regulations must be read as saying "a minister of *some* religious denominations". The Crown is in effect arguing that they mean "a minister of any religious denomination except Jehovah's Witnesses", and the Court is being asked in effect to amend the Regulations.

The principles to be considered by the Court are well stated in *Jones v. Opelika*; *Bowden et al. v. Fort Smith*; *Jobin v. Arizona* (1942), 316 U.S. 584.

John J. Robinette, K.C., for the defendant, respondent: The appellant has not satisfied the onus of bringing himself within the exemption. There is no organization known as "Jehovah's Witnesses"; that term is used to describe persons who call themselves "ministers of the gospel", but who are in fact merely adherents, and devote themselves to the purposes, of a Pennsylvania corporation, the Watch Tower Bible and Tract Society. The evidence shows that they have no creed, no constitution, and no basic system of organization. The so-called "ministers" are appointed by the American corporation, and their policies are prescribed by it. The so-called "governing body" of Jehovah's Witnesses is merely the executive committee of the directors of the corporation. The evidence shows that the plaintiff was in fact appointed a "minister" by the Watch Tower Bible and Tract Society.

In their own literature, Jehovah's Witnesses do not claim to be a religious denomination. Before 1931 they were known as "Bible Students", and that name is indicative of their purpose. Their purposes may include the distribution of tracts and other literature published by the Watch Tower society, and the literal study of the Bible; these may be evangelical purposes, but these persons do not claim to be, and are not, a religious denomination. They deny expressly that they are a cult or sect: *Rex v. Brown* (1908), 17 O.L.R. 197, 14 C.C.C. 87. To come within the exemption, a religious denomination must be a recognized and organized body, and the plaintiff has failed to prove any organization.

There was no ceremony or rite whereby the plaintiff became a "minister". If he is acting as a servant of the Watch Tower Bible and Tract Society, then he is acting in a non-denominational capacity: *Flint v. Courthope* (1918), 87 L.J.K.B. 504. All Jehovah's Witnesses claim to be ordained ministers. The Regulations could not have contemplated a group of which every member was a minister, but referred rather to a single leader of the flock. The plaintiff does not claim to be in a position different from that of any other of Jehovah's Witnesses. *Saltmarsh v. Adair*, [1942] S.C. (J.) 58, is directly in point, and cannot be distinguished from this case. The plaintiff's authority to act in any special capacity came from an incorporated company which was non-denominational in its purposes. Another author-

ity directly in point is *Rex v. Stewart*, [1944] 2 W.W.R. 86, [1944] 3 D.L.R. 331, 81 C.C.C. 349.

The real point of this case is that these people are conscientious objectors, and the plaintiff should have presented himself before the tribunal specially constituted to deal with such persons.

W. Glen How, in reply: Jehovah's Witnesses, as an organization, are in no way comparable to the evangelization society discussed in *Flint v. Courthope*, *supra*.

Cur. adv. vult.

26th December 1945. ROBERTSON C.J.O.:—This is an appeal by the plaintiff in the action from the judgment of Mr. Justice Hogg, dated 27th April 1945, by which the plaintiff's action was dismissed, with costs.

The action commenced in this way: In May 1943 the appellant was notified, in accordance with the National War Services Regulations, to present himself for medical examination before an examining physician, and that if he was found fit he would be notified to report for military training at a time and place which would be indicated to him. Subsequently, the appellant received notice requiring him to present himself before the Mobilization Board. The appellant did not present himself before the Board, as required, and further notice was given him that unless he communicated reasons for his failure, action would be taken against him in accordance with the National Selective Service Mobilization Regulations, 1944 ([1944] 1 C.W.O.R. 566). The appellant thereupon brought this action, claiming a declaration that he is a minister of a religious denomination within the meaning of the Regulations, and that the Regulations do not apply to him, and, further, for declarations that the notices aforesaid were invalid, and that any order, direction or proceeding affecting the appellant, and purporting to be made under the authority of the Regulations, is illegal, void and unlawful.

The appellant, as the ground for claiming that he is not within the Regulations, alleges that he is, and that at all material times he was, a minister of a religious denomination, to wit, Jehovah's Witnesses. In Part I, s. 3, subs. 2(c) of the Regulations, it is provided that the Regulations shall not apply to "A regular clergyman or a minister of a religious denomination". The question that is raised is whether the appellant

comes within the description of "a regular clergyman or a minister of a religious denomination".

A preliminary objection was made that, considering the circumstances of this case and the character of the declarations sought, the appellant is not entitled, according to the practice of the Court, to bring this action, pursuant to s. 15(b) of The Judicature Act, R.S.O. 1937, c. 100, for a declaratory judgment, when no consequential relief is claimed. Mr. Justice Hogg was of the opinion that he had jurisdiction to entertain the action, and that it came within the principle of such cases as *Dyson v. Attorney-General*, [1911] 1 K.B. 410. This objection was fully argued before us, but, in the view that I have formed upon the merits of the appellant's case, I do not find it necessary to state any opinion upon it.

In his reasons for judgment Mr. Justice Hogg has dealt at length with the interpretation of that clause of the Regulations in question here, as well as with the somewhat voluminous evidence put in by the appellant in support of his allegation that he is "a minister of a religious denomination". The appellant did not claim to come within the description of "a regular clergyman".

The burden of establishing his right to exemption from the Regulations is clearly upon the appellant. The trial judge seems to have inclined to the view, without finally deciding the question, that there is a religious denomination known as "Jehovah's Witnesses". He held, however, that the appellant was not a "minister" of that denomination, and dismissed the action.

I do not conceive it to be any part of the functions of this Court, in considering this appeal and in giving judgment upon it, to pass any judgment upon the soundness or wisdom or any other quality of the religious beliefs or practices of those who are called Jehovah's Witnesses. To be "a minister of a religious denomination" within the meaning of the Regulations, I do not suppose that it is necessary to belong to any Christian body. I do not know why a Jewish rabbi or a Mohammedan friar or a Buddhist priest may not be "a minister of a religious denomination" within the meaning of the Regulation: *Reg. v. Dickout* (1893), 24 O.R. 250.

It would not, perhaps, be altogether fair in a court of justice to determine whether or not particular words in the Regulations

should be held to apply, or not to apply, to the people who are called Jehovah's Witnesses, by interpreting these words of the Regulations in the sense that they themselves use them in their publications. It is not uncommon, when a body of persons adopts new doctrines or new forms and practices of religion, that words in more or less common use, and that have a long-established and generally accepted meaning, are arbitrarily appropriated by them to new uses and given meanings that are neither their common nor their proper meaning. There is a good deal of that sort of thing running through the evidence in this case. In Ex. 18, which bears on its cover the title "1941 Yearbook of Jehovah's Witnesses", I find this on p. 16: "Jehovah's witnesses could not be a cult or sect of religionists, because Jehovah God expressly denounces religion as a snare of the Devil, employed to deceive and to entrap men and to turn them away from God." On the same page appears this definition, "'Religion' is doing anything contrary to the will of Almighty God", and again, "Religion originated with the Devil and has been used by the Devil at all times since to deceive the people. . . ."

I am confident that it was not in any sense such as these quotations suggest that the Regulations use the word "religious" as an adjective qualifying the word "denomination", and in spite of them it would be proper, in my opinion, and fair to the appellant, to say that the word, "religious", used in the Regulations, may be applied not inaptly to the people known as "Jehovah's Witnesses".

I have more difficulty with the question whether Jehovah's Witnesses are a denomination. There is no evidence of the act of forming them into an organized body in Canada, whatever they may be elsewhere. According to the evidence there are persons known as "Jehovah's Witnesses" in many countries of the world, but there is no evidence, so far as I have seen, that the name "Jehovah's Witnesses" is a name that specifically denotes an organized body of persons anywhere. On the contrary, in the publications put in evidence there is a plain intention to distinguish "Jehovah's Witnesses" from all religious sects or cults or denominations. In Ex. 18, already referred to, on p. 17, the following appears: "Who, then, are Jehovah's witnesses? and by whom are they selected and organized to perform their duties and carry on their work? They are made up of persons

who are entirely devoted to Jehovah God and his kingdom and who are diligent and faithful in carrying out his orders as commanded by the Most High. They are selected or chosen by Almighty Jehovah God. No man could select them." Then follow some pages upon the same subject, and towards the end of this section appears this: "In the light of the foregoing Scriptural testimony it must be admitted by all sincere persons that it would be blasphemy to claim that any man is the founder and organizer of Jehovah's witnesses. It is offering an indignity to Almighty God to designate his witnesses as 'a sect or cult.'" Again at p. 30 of Ex. 18 it is said, "'Jehovah's witnesses,' as hereinbefore stated, is a term which has always been applicable to those who are fully devoted to Jehovah God and his service." Referring to Pastor Russell, who, if not the founder of Jehovah's Witnesses, may at least be said to have been the organizer of certain corporations to which I shall refer later, and which are closely associated with these people, it is said at p. 29, "Pastor Russell repeatedly by word of mouth and by his writings pointed out that the denominational church systems are not Christian, and hence he called such organizations 'churchianity' as contradistinguished from Christianity." At p. 27 appears this: "Unlike religious denominations who meet in houses and perform certain formal ceremonies, Jehovah's witnesses go to the people and talk with them."

It seems to be a fundamental belief of these people that at some time in 1914 there occurred the "second coming" of Christ upon earth, that the millennium then commenced, and that the whole world is under a theocracy. In Ex. 9, at p. 7, it is said, "Jehovah's kingdom is already here. He has placed Christ Jesus, earth's rightful Ruler, upon his throne of authority. . . . By the events of the World War, famine, and pestilence, and great distress that befell the nations during and after 1914, the second coming of Christ and his Kingdom are clearly proven."

In Ex. 18, beginning at the foot of p. 27, this appears: "Why is the name 'Jehovah's witnesses' given to the body of Christian men engaged in preaching the gospel of The Theocracy? All true followers of Christ Jesus are Jehovah's witnesses, whether they are called that or not. Since the days of Jesus in the flesh and of his apostles, who walked with him, there have been some faithful followers of Christ Jesus on earth, and hence witnesses

of Jehovah. Within a short time after the death of the apostles selfish and ambitious men amongst the Christians set about to organize denominations called 'churches' or 'church organizations' Such organizations or religious systems designated themselves as religious churches, and now they teach the doctrines or traditions of men. . . ."

To accord with their beliefs and principles the people known as "Jehovah's Witnesses" seem to have avoided organization into a definite body—this conforms with their assertion of a theocracy and the divine selection of the persons who become Jehovah's Witnesses. To form themselves into a religious denomination would be contrary to their faith. It has not, however, been deemed to be contrary to their principles to establish organizations to carry on certain of their work, and even to make appointments to positions of importance among them. In fact the functions that commonly are placed in the hands of a governing body seem to be performed by one or other of these corporations or by committees or associations of individuals that appear to have some connection with them, while the general body of persons who are called Jehovah's Witnesses have no voice in the appointment or control of the officers of these corporations or the members of the committees.

In 1884 Pastor Russell obtained the incorporation under the laws of the State of Pennsylvania of the society, the present name of which is "Watch Tower Bible and Tract Society". The purpose of the corporation was "the dissemination of Bible truths in various languages by means of the publication of tracts, pamphlets, papers and other religious documents, and by the use of all other lawful means which its board of directors duly constituted shall deem expedient for the furtherance of the purposes stated." In 1908 a New York State corporation was organized, the present name of which is "Watch Tower Bible and Tract Society Inc." Its purposes were the same as those of the first-mentioned corporation. Mr. Chapman, who is director or superintendent in Canada of ministers and evangelists, was appointed to that position by a letter from the Watch Tower Bible and Tract Society of Brooklyn, N.Y. It was signed by J. F. Rutherford, who is President both of the Watch Tower Bible and Tract Society, the Pennsylvania corporation, and Watch Tower Bible and Tract Society Inc., the New York cor-

poration. Mr. Chapman issued a certificate to the appellant as "an Ordained Minister of Jehovah God". It is not suggested that the company of Jehovah's Witnesses in Canada had any voice in the appointment of Mr. Chapman to his position, or that the company of Jehovah's Witnesses in Toronto had any voice in the appointment of the appellant as minister.

There is much in the evidence to support the view that the theory of government of these people is that the only true government of the world is the theocracy to which I have already referred, and that the corporations which control and manage the affairs of Jehovah's Witnesses are instruments used in the service of that theocracy, and that to organize Jehovah's Witnesses into what, in common speech, would be called a religious denomination is wholly in conflict with the principles of their government. To anyone who did not accept the principles of government by a theocracy, and of the divine selection of Jehovah's Witnesses, it might appear that the only real government of this body of people is to be found in the Pennsylvania and New York corporations, at least so far as the United States and Canada are concerned, and that the general body of Jehovah's Witnesses are simply those who follow them and those associated in their control and management. Whatever view is taken, I am far from satisfied that the evidence warrants a finding that the people calling themselves Jehovah's Witnesses constitute a "religious denomination" within the meaning of the Regulations. As the burden of establishing this is upon the appellant, and as such a finding is essential to his success in this action, I would, upon that ground alone, dismiss it.

I need not discuss at length the question whether, assuming that there is a religious denomination known as Jehovah's Witnesses, the appellant is a minister of that denomination. That matter has been dealt with by Mr. Justice Hogg, and in my opinion the conclusion reached by him is right.

Mr. Chapman, in his evidence, says "Jehovah's Witnesses are a society of ministers", and again, "Those who are really Jehovah's Witnesses must be ministers. They cannot be anything else." In Ex. 18, at p. 27, appears this: "Throughout all the earth where there are companies of Jehovah's witnesses each individual, as opportunity is afforded, engages in thus preaching this gospel of the Kingdom." It may be that to these

people it is the duty of everyone to become one of Jehovah's Witnesses and a preacher of the gospel, and to be a minister. I do not think that it is in the same sense that the word "minister" is used in the Regulations. I do not think that by common understanding of the expression "minister of a religious denomination", as used in the Regulations, it was intended to include all such persons as are members of the denomination. While the appellant was appointed by the Watch Tower Bible and Tract Society of Brooklyn, N.Y. to special work at Toronto, it is not at all clear that he was not in the services of that corporation. I cannot see that there is, in the evidence, sufficient to support a finding that the appellant is entitled to the exemption he claims as a minister of religious denomination.

I would, therefore, dismiss the appeal, with costs.

HENDERSON J.A. agrees with ROBERTSON C.J.O.

GREENE J.A. died before the delivery of judgment.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: W. Glen How, Toronto.

Solicitor for the defendant, respondent: John J. Robinette, Toronto.

[COURT OF APPEAL.]

Niles et al. v. Lake.

Banks and Banking—Joint Account—Effect of Joint Deposit Agreement—Intention of Parties—Transfer of Moneys into Joint Ownership—Survivorship—Resulting Trust.

A, wishing to open a joint bank account in her own name and that of her sister L, signed the Bank's form of "Agreement re Joint Account", in which it was stated that the parties agreed "that all moneys now or which may be hereafter deposited to the credit of the said account . . . shall be and continue the joint property of the undersigned with right of survivorship; and each of the undersigned in order effectually to constitute the said joint deposit account hereby assigns and transfers to all of the undersigned jointly and to the survivor or survivors of them any and all moneys . . . deposited to the credit of the said account . . . to be the joint property of the undersigned and the property of the survivor or survivors of them." The account was opened the same day, with a deposit made by A, and the agreement was signed later by L, who lived in a different city. A continued to keep the pass book, and to make all withdrawals from and deposits in the account, until her death. There was no evidence as to A's intention in opening the joint account.

Held, the moneys in the account, at A's death, did not become part of her estate, but were the sole property of L by right of survivorship, according to the terms of the agreement. The language of that document was free from all ambiguity, and there was no room for the application of the principle of a resulting trust, in A's favour, of the beneficial interest in the moneys. *In re Mailman Estate*, [1941] S.C.R. 368, distinguished.

Judgment of Greene J., [1945] O.R. 652, reversed.

AN APPEAL by the defendant from the judgment of Greene J., [1945] O.R. 652, [1945] 4 D.L.R. 795, in favour of the plaintiffs.

13th and 14th November 1945. The appeal was heard by HENDERSON, LAIDLAW and ROACH JJ.A.

J. R. Cartwright, K.C., for the defendant, appellant: It is conceded that all the money deposited in this account was that of Mrs. Arnott. Where there is the bare fact of the opening of a joint account in these circumstances, a resulting trust is presumed, unless it is for the benefit of a child or wife. But that presumption is rebuttable, and where the document is clear and unambiguous, and contains a definite transfer of the property, that is evidence to rebut the presumption. Where the document is under seal, and is clear and free from ambiguity, the Court cannot go outside it: *Plater v. Brealey*, [1938] O.W.N. 365, affirmed [1939] O.W.N. 203.

The opening date of the account is not conclusive. Before the opening of the account, Mrs. Arnott had declared her intention under seal. As soon as the agreement was returned, it became binding upon the money then on deposit, and on moneys deposited thereafter.

In *In re Mailman Estate*, [1941] S.C.R. 368, [1941] 3 D.L.R. 449, the result is against my contention, but the reasoning of the majority, and the application there made of the established principles, supports my position. The form of the document there was entirely different from that in this case or in *Plater v. Brealey*, *supra*. The only evidence to which effect was given by the Court was the document itself. I rely on the judgment of the majority at pp. 374 *et seq.* All the members of the Court agreed that it was a question only of construction of the document, and of whether it evidenced an intention to create a joint tenancy. The agreement here clearly expresses such an intention; the concluding words, giving power to the survivor to withdraw, were really unnecessary, and were inserted *ex abundante cautela*.

As to the effect of an adult and literate person signing a document, even without reading it, I refer to *Cashin v. Cashin*, [1938] 1 All E.R. 536 at 545, [1937] 1 W.W.R. 788. What is required to support a plea of *non est factum* is stated in 10 Halsbury, 2nd ed. 1933, p. 219. See also *L'Estrange v. F. Graucob, Limited*, [1934] 2 K.B. 394; 10 Halsbury, p. 164.

The trial judge looked upon the agreement as merely the establishment of a joint account, but it was more than that. [HENDERSON J.A.: The trial judge stresses the fact that in some of the cases it appeared that the two parties had gone to the bank together.] The sole question, as shown by the *Mailman* case, is as to Mrs. Arnott's intention.

F. A. Brewin, for the plaintiffs, respondents: Full effect can be given to this document without finding in it any transfer of the beneficial interest, or anything to rebut the presumption of a resulting trust. We concede that the parties were joint owners at law, but the beneficial interest remained in Mrs. Arnott. The whole doctrine of resulting trusts is based upon a separation of the legal and the beneficial interest. The leading case is *Dyer v. Dyer*, reported and discussed in White & Tudor's Leading Cases in Equity, 9th ed. 1928, vol. 2, p. 749. Our case would have been just the same if the bank account had been opened in the name of the defendant alone. The burden is on the defendant as soon as we show that all moneys in the account were advanced by Mrs. Arnott. The note to *Dyer v. Dyer*, at p. 756, gives the authorities for saying that the same rule applies to personal estate

as to realty; see also p. 763; also Underhill on Trusts and Trustees, 8th ed. 1926, p. 158.

There is nothing in the agreement here that purports to convey the beneficial interest in the bank account to the defendant. [ROACH J.A.: It says the money is to be their joint property during their lives, and the property of the survivor; there is nothing there to suggest any separation of the legal and beneficial interest.] The language is no stronger than in the case of a deed in fee simple, after which a resulting trust has been held to arise. There cannot be a resulting trust until the legal estate has been effectively conveyed.

The observations of Crocket J. in *In re Mailman Estate*, *supra*, about the insertion of special provisions to take effect in case of death are equally applicable here. If the first part of the document had been intended to create a joint tenancy as to the beneficial interest, there would have been no need for that concluding part. Parts of Crocket J.'s judgment become clearer when they are read in the light of the line of authorities such as *Southby v. Southby* (1917), 40 O.L.R. 429, 38 D.L.R. 700, and *Smith v. Gosnell* (1918), 43 O.L.R. 123.

We refer also, in connection with resulting trusts, to 15 Halsbury, 2nd ed. 1934, p. 715; 33 Halsbury, 2nd ed. 1939, p. 149; *Underhill*, *op. cit.*, p. 148.

The true basis of the decision in the *Mailman* case was that the document did not express the true relations between the parties, but was prepared by, and for the convenience of, the bank. That is equally true here. There was, as found by the trial judge, no meeting of minds before its execution. Mrs. Arnott executed it and opened the account before the defendant knew anything about it. Similar cases are *Southby v. Southby*, *supra*, and *Smith v. Gosnell*, *supra*. The view that the document is a mere direction to the bank, and not a real agreement between the parties, is not dependent upon the wording of the document itself; in the *Mailman* case the document purported to be an agreement between the parties: see pp. 377-8. This was one *ratio* in the *Mailman* case, and is binding on this Court.

The parol evidence rule does not prevent us from arguing that the only real agreement between the parties was to direct the bank in a particular way, and that the position as between them was not dealt with at all.

This document, whatever intention it may seem to witness, is only part of the evidence: *McEvoy v. The Belfast Banking Company, Limited*, [1935] A.C. 24 at 52. On the whole evidence, the Court should find that Mrs. Arnott had no intention of making a gift. Although there is no express statement of intention either way, the defendant said, after Mrs. Arnott's death, that she supposed the joint account had been set up for convenience. Other circumstances which seem to indicate that there was no intention to make a gift are:

(a) the fact that Mrs. Arnott was seriously ill: *Marshal v. Crutwell* (1875), L.R. 20 Eq. 328;

(b) the making of a will, some ten days later, leaving the residue of the estate to her brother and sisters equally, and making the defendant an executrix; the whole estate was about \$15,000, including real estate of about \$3,500, so that there was very little personal estate except this bank account;

(c) the retention of the pass book by Mrs. Arnott, and the fact that she signed the only cheques that were drawn on the account: *Daly v. Brown* (1907), 39 S.C.R. 122 at 130-1;

(d) the fact that the moneys deposited in this account came principally from the estate of Mrs. Arnott's deceased husband, and were practically her entire resources; she had said, a few days before she opened this account, that her husband had provided for her, and it would be extraordinary if she had intended to give the whole amount to the defendant

Plater v. Brealey, supra, is distinguishable in the manner indicated by the trial judge. If it were authority for the proposition that in all cases the document was conclusive, it would be overruled by *In re Mailman Estate, supra*.

In *Re Reid* (1921), 50 O.L.R. 595, 64 D.L.R. 598, the majority judgment supports our argument that the intention is to be deduced from all the surrounding circumstances.

W. H. Powell, for the plaintiffs, respondents, referred the Court to the Australian case of *Russell v. Scott* (1936), 55 C.L.R. 440, and the discussion thereof in 15 Can. Bar Review, 1937, pp. 371 *et seq.*

J. R. Cartwright, K.C., in reply: Crocket J., in the *Mailman* case, *supra*, when he points out that the document was drawn by the Bank, is discussing the question whether it deals with the rights of the parties *inter se*. If the respondents' submission here

is correct, the entire discussion in the *Mailman* case was unnecessary. If Crocket J. had found in the agreement words expressive of an intention that the property in the money should pass, that would have been an end of the case.

What raises the presumption of a resulting trust is the naked fact that a person takes his own money and puts it in his own name and that of another. Where there is a formal document containing other provisions, each of those provisions is evidence which may be considered in determining whether or not the presumption has been rebutted.

The facts in *Southby v. Southby*, *supra*, and *Smith v. Gosnell*, *supra*, differed materially from those in the present case.

Equity will not permit a person, any more than law will permit him, to give parol evidence to show that he is not bound by a deed executed by him: *Cashin v. Cashin*, *supra*, at p. 545.

The decision in *Standing v. Bowring* (1885), 31 Ch. D. 282, is discussed in *Re Reid*, *supra*, at pp. 598-9.

Cur. adv. vult.

3rd January 1946. HENDERSON J.A.:—I have had the privilege of reading the reasons and conclusions of my brother Laidlaw and my brother Roach, and in them I entirely concur.

LAIDLAW J.A.:—Upon motion made under Rule 610 by counsel on behalf of the executors of the last will and testament of Georgena Arnott, deceased, Hope J., by order dated the 13th November 1944, directed that an issue be tried between the appellant and the respondents to determine whether the sum of \$10,070.80, on deposit in the Royal Bank of Canada at Port Hope, in account no. 2047 belonged to and was an asset of the estate of the late Georgena Arnott, deceased, and ought to be distributed according to the terms of her last will and testament. The issue was tried before the late the Honourable Mr. Justice Greene. It was determined in the affirmative, and by his judgment dated the 25th day of August 1945, it was declared and advised accordingly. The plaintiffs in the issue are four surviving sisters and a brother of the deceased and the defendant is a sister. The defendant now appeals to this Court and asks that the judgment of Greene J. be reversed; that the claim of the plaintiffs be dismissed, and that it be declared that the sum in question is the property of the appellant.

On 16th December 1943, Georgena Arnott was seriously ill in the hospital at Port Hope. She wanted to open an account in the branch of the Royal Bank in that town, and at her request the manager of the bank called on her. She said to him, "I want to open a joint account in your bank with my sister Mrs. Blanche V. Lake." She handed him \$560 in cash and he said to her: "It will be necessary for you to sign one of our standard forms for the operation of a joint account", also "it will be necessary for you to give us a specimen of your signature." Mrs. Arnott thereupon executed under seal a document in form required by the bank and referred to at the top thereof as "Form Le 233A—Agreement re Joint Account". She also gave a specimen of her signature on a card furnished for that purpose. The manager of the bank then told Mrs. Arnott that he would forward the form to Mrs. Lake for her signature. Mrs. Lake resided in Toronto, and the form of agreement executed by Mrs. Arnott was forwarded to her by mail on the same day. Mrs. Lake executed it under seal and it was returned to the manager of the bank at Port Hope. A bank book was furnished by the bank and was in the possession of Georgena Arnott until the time of her death on the 27th February 1944.

After the account was opened Mrs. Arnott made payments of certain amounts by cheque totalling \$215.05, and made deposits as follows: 15th February 1944, \$1,139.26; 17th February \$6,570.00; 24th February \$1,977.83.

There was no arrangement or discussion between Mrs. Arnott and the appellant before the account was opened. Afterwards, on the 10th or 12th January 1944, during a visit by the appellant at the hospital, Mrs. Arnott asked her if she had received a paper from the bank and if she had signed it, and the appellant told her she had done so. Nothing more was said about the matter.

The appellant had no knowledge whatever of the amounts from time to time deposited or withdrawn by Mrs. Arnott, and she did not use the account at any time during Mrs. Arnott's lifetime. Afterwards she learned the amount of the balance to the credit of the account, and on 8th September 1944 she issued a cheque for the full amount, \$10,108.56, to transfer it into savings account no. 901, in her own name in the bank.

Counsel for the appellant relies on the provisions contained in the "Agreement re Joint Account". It is addressed "To The Royal Bank of Canada, Port Hope, Ontario Branch" and I reproduce the contents in part as follows:

"We the undersigned, having opened a Savings Deposit Account with the above named Branch . . . in our joint names do for valuable consideration . . . hereby mutually agree, jointly and each with the other . . . that all moneys now or which may be hereafter deposited to the credit of the said account, and all interest thereon, shall be and continue the joint property of the undersigned with right of survivorship; and each of the undersigned in order effectually to constitute the said joint deposit account hereby assigns and transfers to all of the undersigned jointly and to the survivor or survivors of them any and all moneys which may have been heretofore or may now or hereafter be deposited to the credit of the said account together with all interest which may accrue thereon to be the joint property of the undersigned and the property of the survivor . . . of them."

It is essential to observe at once the mutual agreement between the parties "that all moneys . . . deposited to the credit of the said account . . . shall be . . . the joint property of the undersigned", and the express provision that in order effectually to constitute the said joint deposit account each of the parties to the agreement assigns and transfers to both of the parties jointly and to the survivor of them any and all moneys deposited to the credit of the account "to be the joint property" of the parties and the property of the survivor of them. The language is perfectly plain and free from all ambiguity and doubt. It means just what it says, and, unless the effect of it is destroyed or altered by the application of some principle of law or equity, the money standing to the credit of the bank account from time to time was the joint property of the appellant and Georgena Arnott, and upon the death of Georgena Arnott the appellant became the sole owner of the property. There is a clearly expressed intention on the part of both parties to the agreement "effectually to constitute the joint deposit account", and by express language in the document each of the parties assigns and transfers all her separate interest and estate in all moneys deposited in the account into joint property of both of them. It is urged by counsel for the respondents that there was no assignment or transfer of the equitable estate in the moneys and that the language used should be interpreted as an assignment and transfer, to the appellant, of the legal estate only. It is said that in the absence of words showing expressly an intention on the part of Georgena Arnott to

part with the beneficial interest in the moneys owned and deposited in the account by her the Court should hold that it remained with her. This argument rests on the basis that there is a presumption in equity that a person who voluntarily transfers his or her property to another (except in the case of a transfer to a wife or child) does not intend to part with the beneficial ownership of it and there is a resulting trust in favour of the transferor.

It is my view that the determination of the question in controversy in this appeal does not depend upon the application or effect of the presumption relied upon by counsel for the respondents. It depends, I think, upon the construction to be given to the plainly expressed provisions of the agreement under which the bank account was constituted. There is no express limitation or condition of any kind annexed by either party to the assignment and transfer by one of them of any or all moneys to be joint property of both of them. No such limitation or condition can be properly implied. There is no evidence to show that the late Georgena Arnott intended to keep the beneficial ownership of the moneys, or any of them, in herself. There are no circumstances which in any way destroy or alter the effect in law of the provisions of the agreement. In consequence I hold that under the provisions of the agreement the appellant acquired a joint ownership of both the legal and the equitable estate in the moneys deposited to the credit of the account and she became the sole owner on the death of Georgena Arnott.

Having determined that both the legal and equitable ownership of the moneys on deposit passed to the appellant, the question of a trust in favour of Georgena Arnott does not arise. But even if it be presumed that Georgena Arnott did not intend to transfer her beneficial interest in her moneys to the appellant, such a presumption is rebuttable and I would hold upon the evidence in this case that the presumption has been overcome. The provisions of the agreement clearly rebut the presumption, and it is not open to the respondents to show by evidence any different intention, on the part of one party to it, than that which is expressed in language free from ambiguity or doubt.

It remains to mention in particular certain cases relied upon in argument by counsel for the respondents. *In re Mailman Estate*, [1941] S.C.R. 368, [1941] 3 D.L.R. 449, is, in my opinion,

clearly distinguishable. The contents of the agreement made in respect of the joint account in that case show that its nature and purpose were confined to the operation of the account and the document was regarded by the majority members of the Court as "a mere compliance with the usual requirements of the bank for the opening of any joint deposit account": *per* Crocket J. at pp. 377-8. It is pointed out (*per* Crocket J. at p. 376) that "It contains no reference, express or implied, to the ownership of the money when deposited . . . [and] It does not even indicate the relationship of the parties to the account". It was also pointed out that the respective rights of the parties as they appear from the document "are definitely restricted to the authority of each to withdraw money from the account" in a stated manner. But in the case now under consideration the agreement is in plainly different terms. It cannot properly be regarded as a mere compliance with bank requirements, nor as an authority only for the withdrawal of moneys from the account by either of the parties to the agreement. It expressly declares the title and ownership of the moneys on deposit, and the relationship of the parties to the account. To treat the document as a mere authority for the operation of the account would require complete disregard of those provisions showing the nature of the account and the clear intention of the parties that the moneys in it are to be joint property.

In *Southby v. Southby* (1917), 40 O.L.R. 429, 38 D.L.R. 700, the evidence showed that the deposit was made for a definite purpose, and the circumstances of the case made it plain that it was not intended to make the moneys in the joint account the property of the claimant. Moreover, the document addressed in that case to the bank is quite different in terms from the one presently before the Court, and lacks all the provisions necessary to constitute a joint ownership of the moneys on deposit.

Smith v. Gosnell (1918), 43 O.L.R. 123, is likewise distinguishable by the difference in nature and contents of the document under consideration.

I have also read and carefully considered the reasons for judgment in *Russell v. Scott* (1936), 55 C.L.R. 440, but that case also is distinguishable on the facts and evidence.

My opinion is that the appeal ought to be allowed and the judgment of Greene J. ought to be set aside, and in place thereof

it ought to be declared that the sum in question did not belong to and was not an asset of the estate of Georgena Arnott, deceased.

The costs of all parties of this appeal, of the trial of the issue before Greene J., and of the motion before Hope J. ought to be paid out of the estate of Georgena Arnott, deceased.

ROACH J.A.:—This is an appeal from the judgment of the late Mr. Justice Greene dated the 25th day of August 1945, declaring that the money in an account standing in the joint names of the appellant and the late Georgena Arnott in the Royal Bank of Canada at Port Hope was an asset of the estate of the said deceased and ought to be distributed according to the terms of her will.

The facts are not in dispute and are set out in the judgment of the learned trial judge, [1945] O.R. 652, [1945] 4 D.L.R. 795. For convenience's sake they may be shortly restated. The late Georgena Arnott and the appellant were sisters. The deceased resided in Port Hope, and the appellant resided in the city of Toronto. On the 16th December 1943, the deceased, who was then a patient in the hospital at Port Hope, sent for the manager of the Royal Bank of Canada at Port Hope and informed him that she wished to open a joint savings account in the names of herself and the appellant. The manager explained to her that it would be necessary to sign the bank's "standard forms for the operation of a joint account". He produced one of such forms, and the deceased signed it. She also gave a sample of her signature on the bank's signature card, and at the same time handed the manager the sum of \$560 in cash to be deposited in the account. The account was opened that day, and, on the instructions of the deceased, the manager sent the joint account agreement, already signed by the deceased, to Toronto for the signature of the appellant. The appellant signed it in due course and returned it to the bank, and that fact was communicated to the deceased. During the months of January and February the deceased deposited substantial amounts in that account and also made certain withdrawals. The appellant did not at any time operate the account, nor did she have any knowledge of the amounts deposited or withdrawn by the deceased. On 29th December 1943, the deceased made a will in which she appointed the appellant and the appellant's husband her executors. By that will she gave a number of personal chattels to certain benefici-

aries, and the residue of her estate she gave equally to her brother and sisters. The deceased died on 27th February 1944. Following her death her executors applied for and obtained letters probate of her will. Subsequently, the appellant, claiming to be entitled to the balance remaining in the said bank account at the date of the death of the deceased, which balance amounted to \$10,070.80, withdrew the same.

The contest, therefore, is whether the appellant as the survivor is entitled to the said money or whether it belongs to the estate of the deceased. By an order made by Mr. Justice Hope and dated the 13th day of November 1944, that issue was directed to be tried and was tried by the late Mr. Justice Greene, with the result already stated.

The agreement which had been signed by the deceased and the appellant reads as follows:

“To

THE ROYAL BANK OF CANADA

Port Hope, Ontario, Branch:

“We, the undersigned, having opened a Savings Deposit Account with the above named Branch of THE ROYAL BANK OF CANADA in our joint names do for valuable consideration (receipt whereof is hereby acknowledged) hereby mutually agree, jointly and each with the other or others of us and also with the said THE ROYAL BANK OF CANADA, that all moneys now or which may be hereafter deposited to the credit of the said account, and all interest thereon, shall be and continue the property of the undersigned with right of survivorship; and each of the undersigned in order effectually to constitute the said joint deposit account hereby assigns and transfers to all of the undersigned jointly and to the survivor or survivors of them any and all moneys which may have been heretofore or may now or hereafter be deposited to the credit of the said account together with all interest which may accrue thereon to be the joint property of the undersigned and the property of the survivor or survivors of them.

“Each of the undersigned hereby irrevocably authorizes the said Bank to accept from time to time as a sufficient discharge for any sum or sums withdrawn from the said deposit account any receipt, cheque or other similar document signed by any one or more of the undersigned without any further signature or consent of the other or others of the undersigned thereto.

"It is understood and agreed by the undersigned with each other and with the said Bank that the death of one or more of the undersigned shall not affect the right of the survivors or any one of them or of the sole survivor to withdraw all of the said moneys and interest from the said Bank and to give a valid and effectual discharge or receipt therefor. Provided, however, that this understanding and Agreement is subject to the requirements of any Succession Duty Act in respect of such moneys and the interest thereon.

"This Agreement shall be binding upon the heirs, executors, administrators, and assigns of each of the undersigned parties thereto.

"WITNESS our hands and seals this 16th day of December A.D. 1943.

SIGNED, SEALED AND DELIVERED	}	"Georgena Arnott"		
IN THE PRESENCE OF			(Seal)	
"Harold Gordon Jax"		}	"Blanche V. Lake"	
"Arthur J. D. Lake"				(Seal)

At the trial, as appears from the learned trial judge's reasons, and in this Court, counsel for the appellant relied solely on the agreement.

The learned trial judge has stated in his reasons that in his opinion "the document does not represent the true facts and cannot be considered as anything more than a voluntary assignment of the legal interest in the money to the defendant. In such case the presumption of a resulting trust arises and there is nothing in the evidence to rebut the presumption."

It should be observed that the plaintiffs' statement of claim does not contain a plea of *non est factum*. The plaintiffs have pleaded "that the said account was opened purely as a matter of convenience so that arrangements might be made to pay accounts on behalf of the late Georgena Arnott in case she was physically or mentally unable to do business." There is no specific evidence that such was the intention of the deceased, but counsel for the respondents argued in this Court that an inference that such was her intention is irresistible when the circumstances are taken into consideration. Of course, if that were so, the beneficial interest in the fund would not pass to the appellant, and there would be a resulting trust in favour of the deceased.

In my opinion the agreement is decisive of the question. Counsel for the respondents urged upon this Court that full effect could be given to that document without declaring that it created any beneficial interest in the appellant, and, because that is so, and whether so or not, the surrounding circumstances can be looked at in ascertaining the intention of the deceased. If there were anything abstruse or ambiguous in the document, of course the Court, seeking the truth, could consider surrounding circumstances as an aid in construing the document. On the other hand, if the document is clear and unambiguous and purports plainly to state the intention of the deceased, then extrinsic evidence should not be permitted to vary it. The rule is stated in 10 Halsbury, 2nd ed. 1933, p. 164, as follows:—

“The effect of executing a deed is that the party, whose act and deed it is, is conclusively bound by the intention or consent expressed therein; he is, as a rule, estopped from averring and proving by extrinsic evidence that the intention or consent so expressed was not in truth his intention or consent, or that there are reasons why he should not be obliged to give effect to the intention or consent so expressed. This is equally the case whether the deed be expressed to operate as a conveyance of property or as a contract or otherwise.”

In *Re Hodgson* (1921), 50 O.L.R. 531, 67 D.L.R. 252, Middleton J. (as he then was) said:—

“Where there is an attempt to cut down the *primâ facie* joint ownership by the introduction of parol evidence an antidote is often found in the words of the document. Here the instrument signed makes no mention of survivorship. Where, as in *Weese v. Weese*, [(1916), 37 O.L.R. 649], *Re Ryan* (1900), 32 O.R. 224, and *Schwent v. Roetter* (1910), 21 O.L.R. 112, the terms of the deposit provide that the bank may pay on the cheque of the survivor, then it would seem to me that this parol evidence would contradict the terms of the writing and might well be rejected unless it is proved that the document is not intended to define the rights of the parties as between themselves and is a mere memorandum defining the rights and duties of the bank.”

There are cases in which the surrounding circumstances have been considered in determining whether there was an intention by one of the parties to create a voluntary bestowment in joint tenancy, but in all of those cases the question was left open by

the terms of the document. *Southby v. Southby* (1917), 40 O.L.R. 429, 38 D.L.R. 700, is an example.

The decisions in other cases concerning the rights of survivors in joint bank accounts cannot be particularly helpful, because they all turn on the particular wording of the agreement or direction given to the bank in each case, together, in cases where the document itself permitted, with the evidence of the surrounding circumstances.

Turning then to the document here in question, it is my opinion that it is so clear and plain as not to permit of any doubt as to its meaning and it must, therefore, be taken as expressing the intention of the deceased.

The second and third paragraphs thereof constitute, in my opinion, only a direction to the bank, but the first paragraph, if the plain meaning is to be given to the language, creates a joint estate in the money as distinguished from the creation of a legal estate in the appellant with the beneficial interest remaining in the deceased. If one focuses one's intention on the words, "We . . . agree . . . each with the other . . . that all moneys . . . shall be and continue the joint property of the undersigned with right of survivorship; and each of the undersigned in order effectually to constitute the said joint deposit account hereby assigns and transfers to all of the undersigned jointly and to the survivor . . . of them any and all moneys . . . to be the joint property of the undersigned and the property of the survivor . . . of them", can there be any doubt as to the effect of that language? It seems to me that it is putting it as plainly as language could express it, that as between the parties the survivor is to be the sole owner of the money, to do with it as she may choose.

During the argument reference was made to *In re Mailman Estate*, [1941] S.C.R. 368, [1941] 3 D.L.R. 449. The document there considered lacked terms found in the one in the case at bar, and is clearly distinguishable. There the paragraph in the document which was relied upon by the survivor was as follows:

"The death of one or more of the undersigned shall in no way affect the right of the survivors, or any one of them, to withdraw all moneys deposited in the said account, as aforesaid."

Referring to that paragraph, Crocket J., delivering the judgment of the majority of the Court, points out, at p. 377, that: ". . . it in no way purports to provide that if and when the sur-

viving signatory does withdraw such moneys he or she shall be deemed to do so as sole owner thereof. It merely preserves the right of either party, in the event of the death of the other, to withdraw all moneys."

And at p. 378, he says: "Even if one were disposed to regard it as an agreement between the parties themselves as to their respective rights concerning the deposit fund, those rights, as already appears, are definitely restricted to the authority of each to withdraw money from the account in the manner stated in the first paragraph. This does not itself necessarily imply the right of the appellant to take the money as his own."

In the document there considered there were no provisions comparable to the provisions contained in the first paragraph of the agreement here in question.

When the learned trial judge expressed his opinion that the document did not represent the true facts, he was obviously referring to the facts stated by him in the immediately preceding paragraph, where he put it thus:

"The agreement commences with a statement, 'We the undersigned, having opened, etc.', whereas the account was opened solely by Mrs. Arnott. The opening date in the account is 16th December, and that is the date of the letter from the bank manager to Mrs. Lake in Toronto, so that she probably knew nothing of the account until the 17th. The agreement purports to be for valuable consideration between the joint depositors, and there was no such consideration. According to the form the parties agree that all moneys shall be joint property, but Mrs. Lake did not know what was in the account until after the death of Mrs. Arnott."

With great respect it is my opinion that the matters to which the learned trial judge there referred do not justify the conclusion at which he arrived, namely, that the document does no more than create a voluntary assignment of the legal interest in the money to the defendant.

I would allow the appeal and direct that the judgment of the learned trial judge be set aside and judgment be entered dismissing the plaintiffs' claim. The costs of all parties on the motion before Hope J., and of the trial of the issue before

Greene J., and the costs of this appeal, shall be paid out of the estate of the deceased.

Appeal allowed.

Solicitors for the plaintiffs, respondents: Mason, Cameron & Brewin, Toronto.

Solicitors for the defendant, appellant: Wray & Russell, Toronto.

[WILSON J.]

Wilton v. Wilton.

Conflict of Laws—Domicile—Acquisition of Domicile of Choice—Member of Armed Forces on Active Service—Evidence Required—Factum and Animus.

It cannot be said without qualification that a member of the armed forces cannot acquire a domicile in the place where he is stationed. *Prima facie*, he retains during his service the domicile he had at the time of enlistment. *Ex parte Cunningham; In re Mitchell* (1884), 13 Q.B.D. 418, referred to. And the *factum* of residence, necessary for the establishment of a new domicile, will not be satisfied merely by proof of a residence imposed upon him by the order of his superiors. But there may co-exist with a residence so begun and continued facts and circumstances which establish a residence voluntary in character and chosen by the soldier, and in this case a new domicile may be acquired. *Sellars v. Sellars*, [1942] S.C. 206, agreed with; *Fozard v. Fozard*, [1924] C.P.D. 62; *Ex parte Quintrell*, [1922] T.P.D. 14, considered; *The Lauderdale Peerage* (1885), 10 App. Cas. 692; *Hodgson v. DeBeauchesne* (1858), 12 Moo. P.C. 285, referred to.

On the facts of the present case, however, *held*, the plaintiff, on whom was the onus of proving that the defendant had acquired a domicile of choice in Ontario, had failed to prove with perfect clearness and to the satisfaction of the Court that the defendant had either the *factum* of residence there or the *animus manendi*, i.e., an intention to settle permanently in Ontario. *Bell v. Kennedy et al.* (1868), L.R. 1 H.L. Sc. 307, referred to. Her action, which was for divorce, must accordingly fail, on the ground that the Court had no jurisdiction.

Divorce—Jurisdiction of Courts—Domicile—Provincial, as Opposed to Canadian Domicile.

There is no such thing, in actions for divorce, as a jurisdiction based upon a general Canadian domicile. Before the Courts of any Province can have jurisdiction, it must be established that the parties are domiciled in that Province and not elsewhere, either in Canada or in a foreign country. *Attorney-General for Alberta v. Cook*, [1926] A.C. 444, applied.

AN undefended action by a wife for dissolution of marriage.

19th and 21st November 1945. The action was tried by WILSON J. without a jury at London.

Mayer Lerner, for the plaintiff

4th January 1946. WILSON J.:—This is an action for divorce in which the following facts were proved: Both the plaintiff and the defendant were born in the Province of Alberta, the latter at Grande Prairie. After their marriage on 10th August 1938, at Red Deer, they resided for approximately two years at the town of Stettler in the same Province, until the defendant enlisted in what is now known as the Canadian Army at Edmonton, some time in 1940. Subsequently he was discharged from the army and he remustered in the Royal Canadian Air Force at Calgary, from which place he was sent, in October 1940, to the Manning Depot at Toronto, Ontario, where he remained for three months before being sent overseas to England. In England he learned special trades, which led to his appointment to the staff of the Royal Air Force station at Clinton, Ontario, in 1941.

During the week-end of 27th February 1941, while still in England, the defendant committed adultery with a woman whose name he declined to disclose. Upon assuming the appointment in September of that year, the defendant took up living quarters at the station, and he continued to live there up to and including the date of the trial.

During the period from September 1941 to 15th May 1945, the defendant refused, in spite of the requests of the plaintiff that he should do so, to establish a matrimonial home. The plaintiff said, "I would have preferred a home but he was not interested in a home." In May 1945 one Hutton, a fellow officer in the Royal Canadian Air Force, who knew of the defendant's adultery and of the domestic differences between the plaintiff and the defendant, with the defendant's permission told the former of the adultery, and she commenced this action on 10th September of that year. Apart from her having lived with the defendant in a room in Toronto for a month and a half in the interval between her arrival in Toronto on 7th November 1940 and the defendant's departure for overseas, the evidence does not establish that the parties have lived together during the time they have been in Ontario.

When the defendant was posted to Clinton at the Royal Air Force Station, he was engaged in instructional duties, and for the past two years he has been in charge of the electronic training section, and he has been doing development work as a result of that at the Clinton Radar School.

In or about the month of May 1945, one Bach, of London, Ontario, broached to the defendant a proposal to join with him in establishing what is now known as the "Bach Instrument Company" at London, Ontario. It was organized in July of the same year and the defendant acquired a financial interest in it and became engaged as its chief engineer.

In July the defendant became eligible for a release from the Royal Canadian Air Force and actually received his discharge from it, and he was ready to assume his duties with the company, which, however, was not yet ready to commence operations. At the same time the Signals Officer at the station at Clinton requested the defendant to reconsider and to stay on at the station as an instructor in the school, which was to be a permanent school and for which it was then necessary to recruit and train a staff of competent personnel. The proposal was that the defendant should remain at Clinton, and that he could have his discharge at any time he requested it in order to take up his duties as chief engineer of the instrument company. The defendant remained in the service of the Royal Canadian Air Force at Clinton under these conditions and he has arranged to obtain his discharge to take effect on or about 1st January 1946.

The defendant has no intention of returning to Alberta, and since he received his first discharge in July 1945 he has maintained a room at a house on Lauder Street, London, which he has occupied during the week-ends, and during the week-ends he has been working, as he put it, "to learn the finer points of the details of the job with which I am not completely familiar as a specialist", with the Bach Instrument Company.

At the trial the evidence established the adultery, but judgment was reserved to consider whether the plaintiff had established the domicile of the defendant in Ontario at the date of the commencement of this action, namely, 10th September 1945, because in the event of failure to establish such domicile this Court is without jurisdiction to try the case.

The defendant did not contest the action, although he was called as a witness on the question of domicile. He was not represented by counsel.

Counsel for the plaintiff, although admitting the domicile of the husband to be that of the wife, also contended that:

(1) the defendant had a Canadian domicile common to the whole of Canada, which would permit this Court to grant divorces in cases where the husband is domiciled anywhere in Canada, and that with respect to divorces at any rate there is no such thing as an Alberta domicile or an Ontario domicile;

(2) the plaintiff had established the intention of the defendant to take up permanent residence in Ontario; and

(3) the defendant had in fact established such a residence.

The first point raised seems to have been conclusively decided against the plaintiff by the decision in *Attorney-General for Alberta v. Cook*, [1926] A.C. 444, [1926] 2 D.L.R. 762, [1926] 1 W.W.R. 742, and it must be taken as settled that, at least in the absence of Dominion legislation giving the provincial Courts such jurisdiction, "The rights of the respective spouses in this litigation . . . cannot be dealt with on the footing that they have a common domicile in Canada, but must be determined upon the footing of the rights of the parties and the remedies available to them under the municipal laws of one or other of the Provinces." (*per* Lord Merrivale at p. 450).

This Court has jurisdiction, therefore, to adjudicate upon this case only in the event of the defendant having abandoned what was undoubtedly his domicile of origin in Alberta, which he retained certainly up to the time of his enlistment in 1940, and his having acquired a domicile of choice in Ontario.

The nature of a domicile or origin as contrasted with the domicile of choice has been well stated by Lord Macnaghten in *Winans et al. v. Attorney-General*, [1904] A.C. 287 at 290: "Domicil of origin, or as it is sometimes called, perhaps less accurately, 'domicil of birth,' differs from domicil of choice mainly in this—that its character is more enduring, its hold stronger, and less easily shaken off."

The burden of proving the change lies, of course, upon the plaintiff: *ibid.*, *per* Lord Lindley, at p. 299, citing *The Lauderdale Peerage* (1885), 10 App. Cas. 692; *Udny v. Udny* (1869), L.R. 1 H.L. Sc. 441 and *Bell v. Kennedy et al.* (1868), L.R. 1 H.L. Sc. 307. That this burden is a heavy one may be seen from any number of cases, of which *Bowie or Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588 may be mentioned as only one. In that case a residence from 1892 to 1927 in Liver-

pool, unaccompanied by any declaration of intention, was held insufficient to prove abandonment of a Scottish domicile of origin for a domicile of choice in England.

Moreover, declarations of intention by the defendant, while admissible, "must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made and they must be further fortified and carried into effect by conduct and action consistent with the declared expression": *per* Lord Buckmaster in *Ross v. Ellison or Ross*, [1930] A.C. 1 at 6-7.

The principles relating to change of domicile have been comprehensively reviewed and considered in *Wadsworth v. McCord et al.* (1886), 12 S.C.R. 466, affirmed *sub nom. McMullen v. Wadsworth* (1889), 14 App. Cas. 631, C.R. [10] A.C. 91, 12 L.N. 314, and by Duff C.J.C. in *Trottier v. Rajotte*, [1940] S.C.R. 203, [1940] 1 D.L.R. 433. Both were Quebec cases, but they establish clearly that the principles are "of universal application as principles of private international law": *Wadsworth v. McCord et al.*, at p. 478; *Trottier v. Rajotte*, at p. 207, and they are, as stated by Duff C.J.C. in the latter case: "first, that a domicile of origin cannot be lost until a new domicile has been acquired; that the process of the acquisition of a new domicile involves two factors,—the acquisition of residence in fact in a new place, and the intention of permanently settling there: of remaining there, that is to say, as Lord Cairns says, 'for the rest of his natural life,' in the sense of making that place his principal residence indefinitely." And further, at p. 209: "Before proceeding to discuss the facts, it, perhaps, ought to be added that a domicile of origin is not lost by the fact of the domiciled person having left the country [in this case the Province of Alberta] in which he was so domiciled with the intention of never returning. It is essential that he shall have acquired a new domicile, that is to say, that he shall in fact have *taken up residence* in some other country [in this case the Province of Ontario] with the fixed, settled determination of making it his principal place of residence, *not for some particular purpose*, but indefinitely." (The italics are mine.)

Before considering the application of these principles to the present case one further question, not so far apparently decided in a reported Canadian decision, must be determined, namely,

whether it is possible for a person during service in the Royal Canadian Air Force to change his domicile. The chief difficulty appears to arise concerning the *factum* of residence, and such decisions as I have found are not unanimous. There is no doubt, however, that *prima facie* a person in naval or military service—and the same applies to air service—retains during such service the domicile he had at the time of his enlistment. The decided cases, *e.g.*, *Ex parte Cunningham; In re Mitchell* (1884), 13 Q.B.D. 418, go no further than this. In Dicey's Conflict of Laws, 5th ed. 1932, at p. 131, it is stated that "A soldier does not, and in fact cannot, acquire a domicil in the place where he is stationed." Although this statement is qualified by the author, I think the criticism of it expressed by Lord Normand in *Sellars v. Sellars*, [1942] S.C. 206 at 211, is well founded when he says: "In my opinion, it cannot be accepted as a true statement of the law unless some qualifications are added." Later, on the same page, the principle seems to be stated correctly: "Now, in my opinion, the requirement of residence is not satisfied merely by proof of residence imposed upon a soldier by the order of his military superiors. But, then, there may co-exist with a residence, which has begun and is continued under military orders, facts and circumstances which establish a residence voluntary in character and chosen by the soldier, although it is a residence in the place in which he is stationed by the order of his military superiors." This statement gains force when the following passage from the judgment of the Earl of Selborne L.C. in *The Lauderdale Peerage, supra*, at p. 739, is considered: "As to the factum there is nothing but military service under the Crown of Great Britain for some years in British North America, and residence in New York in connection with the duties of that service, for some time before and at the time of the marriage, and until his death, which happened two days afterwards . . . These are facts certainly not indicative in themselves of a change of domicil; on the contrary, they are, at least *prima facie*, unfavourable to it; though it is not necessary to say that a residence, even under such circumstances, for several years in New York might not possibly be sufficient, if accompanied and explained by clear proof of an intention to settle there permanently, *sine animo revertendi*." See also *Hodgson v. DeBeauchesne* (1858), 12 Moo. P.C. 285 at 319, 14 E.R. 920.

The only decision seemingly inconsistent with the principle stated in the *Sellars* case is *Fozard v. Fozard*, [1924] C.P.D. 62, a South African case cited in Dicey, *op. cit.*, at p. 131. That was an action for divorce in which arose the question of the jurisdiction of the Court to try it. The facts are briefly that the plaintiff, a leading signalman in the Royal Navy, while stationed at Simonstown, was married in the Province of Cape Town in 1922, and he expected to remain on the station until his discharge was due in April 1925. He intended then to settle in Cape Town, where he had every prospect of getting an appointment in a ship-chandler's business. Until his discharge the plaintiff was not a free agent, and was liable to be transferred to another part of the world, and if war had broken out the discharge might have been deferred. Gardiner J. held that the plaintiff had failed to establish domicile upon the principle (p. 63) stated by Gregorowski J. in *Ex parte Quintrell*, [1922] T.P.D. 14: "... in order to create a new domicile you must not only have residence, but you must have intention to remain permanently and indefinitely, and you must also have the power to carry out that intention. The mere intention of change of domicile is not sufficient." He adopted also what Mason J. suggested in the same case: "'... domicile of choice' implies a capacity to make a choice and to carry it into effect, which is not possible in the case of a soldier still on service and subject to compulsory removal to any part at the discretion of the military authorities."

It is to be noted that in *Ex parte Quintrell*, on appeal from the decision of Gregorowski J., the Court, while affirming his decision, declined to adjudicate upon the principle cited by Gardiner J., and decided that the facts did not show residence in the Transvaal.

If *Fozard v. Fozard* and *Ex parte Quintrell* are really in conflict with *Sellars v. Sellars*, I must say I prefer the reasoning in the last-named case. I think the word "choice" in the expression "domicile of choice" means domicile or residence of choice *per se*, and not residence for special reasons, such as health, business, evasion of punishment, military service, etc.

In the present case, therefore, I find that while, *prima facie*, the defendant retains his domicile of origin in Alberta, it is open to the plaintiff to prove that the defendant has acquired a domicile of choice in Ontario. From what has already been said

it is apparent, however, that the plaintiff has a heavy onus cast upon her to satisfy the Court that the requirements so clearly and concisely set forth by Duff C.J.C. in *Trottier v. Rajotte*, *supra*, have been met.

In my view, and after considering the cases hereinbefore cited, the plaintiff has failed to discharge this onus. Certainly down to the date when the defendant first received his discharge in July 1945, nothing more than residence in barracks was proved. Indeed, according to the plaintiff's own evidence he refused to establish a home for her in this Province at any time since he left the Province of Alberta, although she and the plaintiff had a home there prior to his enlistment. The defendant's chief interest lies in the radio business (not necessarily the Bach Instrument Company), and I think his residence will be wherever such business requires it to be. This does not meet the requirements both as to intention (*animus manendi*) and as to residence (*factum*).

The only real intentions I am able to find on the evidence are an intention to go into some aspect of the radio business in Ontario or Quebec, and an intention not to establish a home for the plaintiff and the defendant, and the taking of a financial interest in and a position with a company in London, Ontario. The defendant stated that some two years ago, having been an apprentice engineer in a radio business in Alberta, he decided to stay permanently in radio work and to make his permanent home in Ontario or Quebec, because the radio manufacturing industry of Canada is to be found mostly in these two Provinces, but there is nothing to indicate that he communicated this decision to anyone. There were no letters to relatives stating that he would not return to Alberta or that he had made a decision to take up permanent residence in Ontario. Apart from the decision referred to, there was no evidence of any express intention to make a permanent home in Ontario, so far as the evidence discloses, before the parties separated in May 1945, and, for reasons already given, the evidence of statements made after that date, and after the defendant expressed a desire to be free from the plaintiff, should be heavily discounted unless supported strongly by other consistent evidence.

The plaintiff having failed to prove with perfect clearness and to the satisfaction of the Court that the defendant intended

to settle permanently in Ontario (*Bell v. Kennedy et al. supra*, per Lord Westbury), the Court has no jurisdiction to try this case.

On the ground of *factum* too I find that the plaintiff fails. There was no residence in Ontario prior to July 1945, and since that time there has been only the occupation of a room during week-ends in London, not for the purpose of establishing residence indefinitely, but to live in for business reasons only. This is not to say that the defendant cannot establish residence by living in a rooming-house. But this fact should be implemented by other facts of such a nature as to prove to the satisfaction of the Court that it is a sufficiently permanent place of abode to qualify as a residence.

The action will be dismissed without costs.

Action dismissed.

Solicitor for the plaintiff: M. Lerner, London.

[COURT OF APPEAL.]

Rex v. Mayosky.

Criminal Law—Dangerous Driving—Sufficiency of Evidence—Influence of Liquor, not Amounting to Intoxication—The Criminal Code, R.S.C. 1927, c. 36, s. 285(6), as enacted by 1938, c. 44, s. 16.

Two women were walking along a street in Kenora, when one of them was struck from behind by an automobile, which did not stop. The accused was proved to have driven along that street at that time, but there was no direct evidence that his car had hit the woman, or as to the manner of his driving. There was evidence that the accused had been drinking during the evening preceding the accident, but it was not sworn or suggested that he was intoxicated. On appeal from a conviction for dangerous driving,

Held, there was sufficient evidence to justify a finding that it was the accused's car which had struck the woman, and that he had been driving it recklessly, and the appeal should therefore be dismissed.

Per ROBERTSON C.J.O. and LAIDLAW J.A.: The consumption of liquor may render a man, although he is not intoxicated, incapable of driving with due regard to the safety of others, and therefore guilty of dangerous driving within the meaning of the subsection.

AN APPEAL by an accused from his conviction.

18th and 19th December 1945. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

G. A. Martin, K.C., for the accused, appellant: I concede that there was evidence on which the trial judge could find that it was the accused's car that struck Mrs. Collins, and that the accused was driving at the time. But there was no evidence that the accused, before the accident, was driving dangerously within the meaning of s. 285(6) of The Criminal Code, R.S.C. 1927, c. 36, as enacted by 1938, c. 44, s. 16.

The accused was lawfully using the highway, and was not required to drive on the right side of the road, provided that he did not actually see Mrs. Collins and her companion as he approached them, and that the circumstances were not such that he should have seen them. He had no reason to expect pedestrians to be walking on the highway as there was a sidewalk along the south side. The uncontradicted evidence indicates that he did not see them. The trial judge should have found that they were walking on the black-topped part of the highway, and not on the snow-covered part. Sjostrom did not see them, although Mrs. Newman waved her arms repeatedly trying to stop him.

The trial judge misdirected himself in law by holding, as he definitely said, that the mere fact that Mrs. Collins was struck was sufficient, in the circumstances, to justify a conviction on the first count. He failed to take into consideration "all the circum-

stances of the case", including those expressly set out in s. 285(6) : *Rex v. Bowman*, [1939] O.R. 421, [1939] 3 D.L.R. 551, 72 C.C.C. 61. There was no vehicular traffic on the road; there was no evidence of excessive speed, and the accused's manner of driving was *prima facie* lawful. The same degree of watchfulness should not be required as at an intersection in a city. The blending of the victim's dark clothes with the pavement afforded a reasonable excuse for failing to see her. The criminal law does not demand a standard of perfection; there must be some blameworthy mental element.

As to the second count, it is submitted that there is no evidence that the accused knew he had struck anyone. On the contrary, he thought he had struck a bridge. I refer to *Rex v. Robitaille*, [1945] R.L. 149, 84 C.C.C. 208.

The sentence was excessive.

W. B. Common, K.C., for the Crown, respondent: There was abundant evidence that the accused had been driving dangerously. The distance that the injured woman was thrown after the accident, the speed at which the accused must have been driving, the damage to his car and the fact that he was driving on the left side of the road, although there was no other traffic, all point to dangerous and reckless driving. The fact that he told a false story to the police when questioned, and also tried to conceal the damage to his car, indicate clearly that he knew what had happened. The evidence is that he had consumed a considerable and varied quantity of liquor during the evening.

The injured woman and her companion, according to the evidence, were dressed in dark clothes, and certainly one of them was walking on the snow-covered part of the highway. In any event, irrespective of whether they were walking on the snow or not, they would have been silhouetted against the snow-bank on the north side of the road, and should have been seen by the accused. They were entitled to walk there, and were under no obligation to walk on the sidewalk on the south side of the road, which was rough and uneven, due to uncleared snow.

While it is true that in some circumstances a driver does no wrong by driving on the left side of the road, the fact that in this case there was no traffic for him to pass, with the surrounding circumstances, clearly points to dangerous driving on his part.

The trial judge did not misdirect himself. There was no doubt on any material fact which would entitle the accused to the benefit of the doubt: *Rex v. Brunton*, 59 B.C.R. 182, [1943] 3 W.W.R. 127, 80 C.C.C. 214, [1943] 4 D.L.R. 465. He was clearly of opinion that the evidence pointed to no other reasonable conclusion except the guilt of the accused.

As to the second count, the evidence is that the accused knew he had hit something, but claimed that it was a bridge. This admission, taken in conjunction with his lies to the police when questioned, and his attempts to conceal the damage to his car, clearly show that he had committed an offence under s. 285(2), as re-enacted by 1938, c. 44, s. 15.

The sentence was, if anything, too lenient.

G. A. Martin, K.C., in reply: The accused could not be expected to know that the sidewalk was rough or uneven, and that Mrs. Collins, because of rheumatism, would find it difficult to walk on it. Evidence that he had been drinking is not relevant, in view of the fact that all the witnesses called by the Crown testified that he was sober. It is not permissible to speculate as to his condition when all the evidence indicates that he was normal.

Cur. adv. vult.

22nd January 1946. ROBERTSON C.J.O.:—The appellant was convicted on the 20th November 1945 on a charge under s. 285(6) of The Criminal Code, R.S.C. 1927, c. 36, as enacted by 1938, c. 44, s. 16, and on another charge of failing to stop after the accident, by Judge Popham sitting in the District Court Judges' Criminal Court for the District of Kenora, and was sentenced to imprisonment for nine months definite and three months indeterminate on the first charge, and to a fine of \$50, and upon default of payment, to two months' imprisonment, on the second charge. He was also prohibited from driving a motor vehicle for a period of two years. He appeals from both convictions and sentences. I do not think we should interfere in any way with the judgment of the learned District Judge.

The appellant was getting ready to go to a wedding on the evening of 27th January 1945 in Kenora. He drove in his car to Norman, on the outskirts of Kenora, to get a man to come in to Kenora and furnish music at the wedding, and while at Norman it is in evidence that he had a drink of liquor and a bottle of beer.

Before going out there he had mixed punch for the wedding party, and had tasted that and had a bottle of beer. No one says that he was intoxicated, but he had had these drinks. On the way back to Kenora from Norman, about 9 p.m., he went by way of the Keewatin Road, which is described as a portion of the Trans-Canada Highway in the town of Kenora, and between Keewatin and Kenora. He went east on this highway into Kenora. In his statement to the police later he said he did not hit anything on the way in, and did not even remember seeing anyone in front of him on the road.

On the same evening, shortly before 9 p.m., two women, Mrs. Newman and Mrs. Collins, were walking east on the same highway from the General Hospital towards Main Street. There was snow on the sidewalk that runs along the south side of the highway, but it was rough, and Mrs. Collins having rheumatism in her ankle, could not walk there. For that reason they walked on the roadway. The road had been partly cleared of snow. In the centre was a strip of bare pavement 15 or 16 feet wide, and on either side of it a strip about 6 feet wide, from which the snow had not been entirely removed. Beyond that there was a snow-bank on either side of the road. Mrs. Newman walked on the strip of snow on the north side of the strip of cleared pavement, and Mrs. Collins walked close behind her on the south. Mrs. Collins is not sure whether she also was walking on the snow, or whether she was on the bare pavement, but she thinks she was walking on the snow, and she says that, thinking she heard a car coming, she moved further over off the road. There was not much traffic. Mrs. Collins recalled only one car passing them on their way in. She remembers nothing about an accident. Mrs. Newman says that she saw Mrs. Collins shoot ahead of her and a motor car went by. She expected the car to stop, but it did not. She gives a description of this car that, so far as it goes, would fit the appellant's car.

Mrs. Collins had been thrown forward and to the north side of the roadway, and was lying, unconscious, on the north snow-bank. The car in which the musician on the way to the wedding travelled, followed some little way behind the appellant's car, and the driver of that car did not see either Mrs. Newman, who signalled to it to stop, or Mrs. Collins, who was then lying on the snow-bank. However, another car, not far behind, stopped,

and the men on a locomotive operating on the railway that crosses the highway not far from the scene of the accident also observed Mrs. Collins lying on the snow-bank. It would appear, therefore, that to anyone keeping a proper look-out, there should have been no difficulty in seeing the two women as they walked along the highway. The night was clear and cold, both women were dressed in black, and against the background of the snow it should not have been difficult to see them.

When the appellant met the musician and his brother, who had accompanied him into town, he asked them if they had seen anything. They answered "no", and the appellant said he thought he must have hit the bridge. The appellant's car had in fact received some damage in a collision. The glass was gone from the left headlight, and there was some damage to the fender on that side, and other small items of damage, all on the left front of the car. When the police found the car the next day the appellant had made some effort to cover up the evidence of a collision by hammering out a dent in the fender, and by putting on fresh paint in some places. The convincing piece of evidence was the discovery on the left side of the car, and down in between the left front fender and the hood, of certain pieces of broken glass. One of these pieces of glass exactly fitted, along the line of fracture, a piece of glass that was found at the scene of the accident. It would appear that the appellant was well aware that an accident had happened, and that he made every effort to conceal his part in it.

It was argued that there was no evidence of reckless or dangerous driving. It was said that there was no evidence of excessive speed. It was contended that the appellant had no reason to expect pedestrians to be using the roadway, and it was argued that it was not to be expected that he would discern a person wearing dark clothing against the dark background of the pavement. In my opinion the learned District Judge was right in his conclusion that in none of these particulars was the appellant entitled to a finding in his favour. There is no direct evidence of the miles per hour at which the appellant was driving, but his unfortunate victim was thrown a considerable distance, and the shock was such that both overshoes she was wearing came off, one of them having been thrown over the snow-bank and into the ditch near the point of impact, while the other was found a considerable distance ahead.

More important, however, than the speed—whatever it was—at which the appellant was driving, was his utter recklessness. No doubt, he did not see anyone on the road in front of him before the collision, but it is impossible to escape the conclusion that he knew very well that he hit some one, immediately afterwards. There is no other reasonable explanation of the question he put to his friends who were following him on the road. His suggestion that he must have hit the bridge, while intended, no doubt, to explain to them why his car was in a damaged condition, is plain evidence that he knew he had been involved in an accident. His efforts the next day to conceal the injuries to his car, and the false statements he then made as to the cause of them, all go to indicate his knowledge of what he had done.

No reasonable explanation is offered for his failure to see the women walking in front of him. They had a right to be there, and it was his duty to avoid them.

There are penalties expressly provided for one who drives a motor vehicle when intoxicated. It cannot be too strongly emphasized, however, that something less than intoxication may make driving a motor vehicle dangerous. No one has the right to use the highway for driving a motor vehicle who is, in the least, incapacitated by drinking from driving with due regard for the safety of others. Too often the driver considers himself alone, and thinks that because he can drive his car he has a right to drive it regardless of others, who have as much right upon the highway as he. Such persons are, sometimes, a greater menace than the driver who is intoxicated, for the latter usually gives some evidence of his condition, and he is either arrested or other drivers are able to avoid him. In the case of this appellant, he had, beyond question, got into a condition, through drink, that made him, if not incapable of driving properly, at least indifferent as to how he drove. His conduct subsequent to the accident, and even on the following day, stamps him as a person who should not be allowed to drive a motor vehicle.

I have no hesitation in saying that the judgment appealed from should be affirmed.

LAIDLAW J.A.:—I concur in the judgment of my Lord the Chief Justice of Ontario and of my brother Roach for the reasons given by them.

ROACH J.A.:—The appellant was convicted in the District Court Judges' Criminal Court at Kenora on the 20th day of November 1945 on two counts charged in an indictment, first, a count of dangerous driving contrary to s. 285(6) of The Criminal Code, as enacted in 1938, and, second, a count of failing to stop and render assistance following an accident contrary to s. 285(2), as re-enacted by 1938, c. 44, s. 15. On the first count he was sentenced to a term of nine months definite and three months indeterminate and "his licence to drive cancelled for two years". On the second count he was fined the sum of \$50 and in default of payment he was sentenced to a further term of two months. He now appeals against both convictions and sentences.

At about nine o'clock on the night of 27th January 1945, two ladies, Mrs. Newman and Mrs. Collins, were walking in an easterly direction along the Keewatin Road, which forms a part of the Trans-Canada highway in the town of Kenora. It was a cold clear night and visibility was good. Keewatin Road at the relevant part is straight and level. The roadway is paved to a width of 28 feet, the surface thereof having a black top. There is a sidewalk on the south side, but none on the north side. The pavement was bare to a width of about 15 to 16 feet along the centre part, and on each side of this bare strip was another strip about 6 feet wide covered with hard packed snow to a thickness, at the outer edges thereof, of about 5 inches, and gradually tapering off to a mere fraction at the edge of the bare strip. At the outer edge of each of these two strips was a line of snow-bank 18 to 36 inches high. The two ladies were returning from visiting at the Kenora General Hospital and were walking toward the centre of the town. They had chosen to walk along the roadway because, as Mrs. Newman put it, "it was too rough with the snow on the sidewalk" and Mrs. Collins, who had rheumatism in her ankle, could not walk there. They had crossed over to the north side of the road so that they would be facing any traffic coming from the east. They had been walking close to one another, Mrs. Newman well over on the strip of hard-packed snow toward the north snow-bank, and Mrs. Collins somewhere close to her right side. They had reached a point about opposite the middle of a row of three houses on the north side of the road when a motor car coming in an easterly direction behind them

struck Mrs. Collins. It did not stop, but continued along the road and disappeared in the distance. Mrs. Collins was rendered unconscious, but Mrs. Newman made some observations of the motor car before it disappeared. She observed that "it was a noisy car and it had a square top and was painted blue",—facts which led to its identification the following day and the arrest of the accused.

There is not the slightest doubt that the motor car was an old Essex coupe of 1929 or 1930 vintage, owned and driven at the time by the appellant.

That evening there had been a wedding at which the appellant was a guest. The wedding reception and festivities were held at the home of one Rapinda, in the east end of Kenora. The appellant was at Rapinda's at least as early as 6.30 that evening. The bridal party did not go to the church where they were married until close to 7 o'clock. The appellant did not go to the church, but remained at Rapinda's, and was still there when the bridal party came from the church in the neighbourhood of 7.45. He left in his car about 8 o'clock, or a little later, to go to the home of the Sjostrom brothers, who live in Norman at the west end of Kenora, to get one of those brothers to come to the festivities and supply music on his accordion. Before leaving for the Sjostrom brothers, he had some conversation with one Oldford. I extract the following from Oldford's evidence:

"Q. When Mayosky left Rapinda's around eight were you talking to him at all? A. Yes, he came and talked to me in the kitchen and asked me if I would move one of our cars so that he could get out.

"Q. Did there appear to be any indication of intoxication at that time? A. I could not say he was any more intoxicated than the rest. There had been some drinking.

"Q. He appeared to be sober? A. Appeared to be sober enough."

The appellant, having left Rapinda's, drove to his own home which is close to Sjostrom's, and from there telephoned Eric Sjostrom and made the necessary arrangements for the latter to come and supply the music. Later, the Sjostrom brothers came over to the appellant's home and before leaving for Rapinda's they visited for a little while.

I extract the following from Eric Sjostrom's evidence:

"Q. What were you doing there? A. Well, we were talking a little bit and I had a little drink.

"Q. What did you have to drink? A. I had a bottle of beer, a drink of liquor and also a drink of wine.

"Q. Did Steve Mayosky have anything to drink to your knowledge? A. Steve had a little drink of liquor and I think he had a bottle of beer—I think that's the way it is."

Concerning that same occasion, I extract the following from Emil Sjostrom's evidence:

"Q. What did you have? A. I had a drink of beer.

"Q. Did you notice what Steve had to drink? A. Yes, he had a couple of drinks.

"Q. Do you know what it was? A. No.

"Q. Was it beer or liquor? A. Well he had a drink of beer, there was some other drinks there, too."

Eventually the appellant left his home in his car to return to Rapinda's. He was followed by the Sjostroms in their car, but the appellant got a considerable distance ahead of them. Their route took them along the Trans-Canada Highway past the hospital to the east end of the town.

When the Sjostrom brothers arrived at Rapinda's the appellant was already there in the yard. The appellant asked them if they had seen anything. They replied that they had not. Then the appellant said that he thought he must have hit the bridge. They looked at his car. The left front fender was dented, and the lens from the left headlight was missing. The appellant proffered the information that the lens had been broken some time before that.

The following afternoon police officers in the town of Kenora saw the accused seated in his car as it was stopped near the town warehouse. Without going into all the details, it will suffice to say that the lens was still missing from the left headlight; the dint had been hammered out in a crude way and freshly repainted; the ring which holds the lens in place had been freshly soldered; the stem on which the left headlight was affixed was loose in its socket, allowing the lamp to revolve; glass from the broken lens was found in the depression between the left front fender and the left side of the hood, one piece of which fitted exactly with a piece which had been picked up on the highway

near the point where Mrs. Collins had been struck. Old blue paint was found, on Mrs. Collins' overcoat, which was the same shade as the old blue paint on the fender; a circular imprint was also found on her overcoat which was the same size as the rim of the headlight. The appellant told the police officers a story, parts of which were obviously untrue. The circumstantial evidence was overwhelming that it was his car which struck Mrs. Collins, and that he was the driver.

The appellant did not give evidence at his trial, nor did he call any witnesses.

At the opening of his argument in this Court, counsel for the appellant admitted that there was sufficient evidence to justify the finding made by the learned District Judge that it was the appellant's car which struck Mrs. Collins and that the appellant was the driver. He confined himself to the argument that there was no evidence, or at least not sufficient evidence, that the appellant was driving dangerously within the meaning of s. 285(6).

As to the quality of the appellant's driving, the District Judge said, in part:

"As to any direct evidence of dangerous or reckless driving, there is practically nothing. No one saw him upon the road and the only evidence are the words used by Mrs. Newman, that 'the car went shooting past', and the evidence of the two Sjostroms that they drove over at about thirty miles an hour and the accused pulled away from them. The force, however, with which Mrs. Collins was struck would indicate that the car must have been travelling very fast, and on a clear, cold night with good visibility and a street light within 34 feet on a road 28 feet wide, of which 21 or 22 feet on his own side of the road was clear, he crossed to within 6 or 7 feet or less of his left hand side and struck one of two women walking there.

"... With the facts as I have found them and no explanation of any kind offered, I cannot do other than to find that the accused was driving in a manner contemplated by the section, and I do so find."

The evil at which the section is aimed is made very apparent by the section itself:

"Everyone who drives a motor vehicle on a street, road, highway or other public place recklessly, or in a manner which is

dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the street, road, highway or place, and the amount of traffic which is actually at the time or which might reasonably be expected to be on such street, road, highway or place, shall be guilty of an offence and liable," etc.

Under that section the quality of the driving is to be measured by reference to all the circumstances of the case, including the specific factors enumerated.

The grounds of appeal against the conviction on the first count, as set out in the notice of appeal, and relevant to the quality of the appellant's driving, are several and may be stated as follows:

1. That there was no evidence to show in what manner he was driving.

2. That he was entitled to drive anywhere on the highway, provided that he was not negligent, and that he was not negligent.

3. That the learned judge erred in law in holding that the striking of Mrs. Collins, under the circumstances then prevailing, was sufficient to justify a conviction under the first count.

4. That the learned judge failed to give the appellant the benefit of the doubt.

I will deal with that last ground first. I do not find in the evidence any matter that is in doubt, unless it be the state of sobriety of the appellant. He allowed his car to come into collision with the lady; his headlights were lighted; the night was clear and the visibility was good; the place on the highway where she was struck is reasonably certain; his car had not suddenly become disabled, as a result of which he struck the lady; neither of the ladies had suddenly altered her course so as to get into the path of the car or confuse the appellant. None of those facts is in doubt. Further, if the appellant was to be believed, he did not know he had struck any person, but thought he had hit a bridge.

The other arguments may be considered together.

As the trial judge pointed out, there is practically no direct evidence of dangerous driving, but the circumstantial evidence is most compelling, and, in my opinion, leads irresistibly to the conclusion that the appellant was driving in a manner dangerous to the public, within s. 285(6).

In the first place, that highway at that particular part is a reasonably important one for east and west-bound vehicular traffic. It leads to and from the General Hospital, and it cannot be assumed that all visitors to the hospital, or members of the hospital staff, go to and fro in motor cars or other vehicles, so that it is a highway of some importance to pedestrians. The surface of the sidewalk being rough, it was not unreasonable that pedestrians would choose to walk on the roadway. At the place where Mrs. Collins was struck, there were three residences on the north side, occupied by persons who, if they decided to walk on the sidewalk, would have to cross to the south side. Hence it was a road on which pedestrian traffic might reasonably be expected.

In the second place there were street lights along the road, spaced about 200 feet apart, apparently, on the south side, and one of those lights was only 34 feet, measured in a straight line south-west, from a point where Mrs. Collin's spectacles were found after the accident. Her body came to rest partly in the snow-bank 43 feet east of the spectacles.

The two ladies were each wearing dark clothing, which would be in contrast to the white snow, and they were in motion.

As a result of the blow which the lady received she suffered a compound fracture of the right tibia and two fractures of the right fibula, as well as multiple contusions on both legs, thighs, hips and on her back. The force of the blow was such that it put a dent in the fender about the size of an ordinary soup bowl, and loosened the headlight stem in its socket. The appellant had left his home just ahead of the Sjostroms. It is something over one mile from the appellant's home to the scene of the accident. The Sjostroms travelled at about 30 miles per hour, but by the time they got opposite the General Hospital the appellant was so far ahead of them that they could not see any lights from his car.

In my opinion the evidence proves beyond any possible doubt that the appellant was driving dangerously, within s. 285(6). It is futile to argue that the circumstances are consistent with any degree of careful driving. They are consistent only with negligence of that degree which amounts to a callous disregard for the life and safety of others, and admit of no other conclusion.

The appeal against the conviction on the first count should be dismissed.

Neither can I see any merit in the appeal against conviction on the second count. The failure of the appellant to stop is *prima facie* evidence of his intent to escape liability, either civil or criminal, and no evidence was given to rebut that presumption. That appeal should also be dismissed.

As I had occasion to say recently, circumstances in cases of dangerous driving will vary almost infinitely. This, in my opinion, was a most flagrant case, and I would not interfere with the sentence imposed by the trial judge. If he erred at all, it was on the side of leniency.

Appeal dismissed.

Solicitor for the accused, appellant: H. J. Donley, Kenora.

Solicitor for the Crown, respondent: C. L. Snyder, Toronto.

[LEBEL J.]

Wood v. Strange et al.

Trusts—Resulting Trust—Property Bought with Funds Contributed by Several Persons, but Title Taken in Names of Two only—Sufficiency of Evidence—Presumptions.

A resulting trust arises by operation of law where, *inter alia*, property is purchased in the name of a person other than the purchaser, without any intimation that he is to hold it in trust, but in such circumstances that the purchaser is presumed to have intended to retain the beneficial ownership. Where a person purchases property in the name of another, or in the names of himself and another jointly, then, unless there is some intimation or indication of an intention at the time to benefit the other person, the property is usually deemed in equity to be held on a resulting trust for the purchaser or transferor. The same principle applies where several persons purchase property in the name of only one of them. *Wray v. Steele* (1814), 2 Ves. & B. 388; *McKercher v. Sanderson* (1887), 15 S.C.R. 296 at 298, applied.

Six unmarried sisters resided together in a house which was registered in the names of two of them, A and B. Two of the sisters died, and in each case A, who was appointed sole executrix, showed the sister as having an interest, amounting to one-sixth in the first instance and one-fifth in the second instance, in the property. This property was sold in 1916, and another property was bought, with funds contributed by all the surviving sisters. The deed was again taken in the names of A and B as joint tenants. B died in 1924, leaving a will whereby she divided her estate equally among the three survivors.

Held, in these circumstances, the presumption applied, and, although the legal estate was vested in A alone as the surviving joint tenant, the beneficial interest was vested in the three sisters equally. A's executor was therefore right, having sold the property after her death, in crediting only one-third of the proceeds to her estate, and giving the other two-thirds to the estates of the other two sisters, who survived A but died before the property was sold.

TRIAL of an issue as to the disposition of certain moneys by the executor of Mary Joseph, deceased.

Mary Joseph died in 1933, survived by two sisters, Matilda Joseph and Amelia Joseph. Matilda died in 1940, and Amelia in 1943. The other facts are fully stated in the reasons for judgment.

9th and 15th November 1945. The issue was tried by LEBEL J. without a jury at Toronto.

J. H. Amys, for the plaintiff.

G. D. Watson, for the defendant.

16th January 1945. LEBEL J.:—The issue in this cause is one directed for trial by His Honour the late Judge Klein in the matter of the estate of Mary Joseph, deceased, which was removed from the Surrogate Court of the County of York for trial in this Court, by order of the Honourable Mr. Justice Hogg: see [1945] O.W.N. 489.

The plaintiff is a beneficiary named in the will of Mary Joseph, who died in 1933, and the defendant is the executor of her estate. In 1943 the defendant sold residential property known as 599 Jarvis Street, in the city of Toronto, for \$13,500, but he has credited only a third of the proceeds, *viz.*, \$4,500, to the estate. On the passing of the executor's accounts the plaintiff objected, contending that the whole of the proceeds should have been credited to the estate, and the order of His Honour the late Judge Klein directed that the issue "shall be whether the executor was entitled to credit the estate with less than the proceeds of the sale of the said real estate . . . and if so, how much." It was not disputed, as alleged in the statement of defence, that one Margaret Joseph died in 1924 and by her last will and testament divided her estate equally among her three surviving sisters, the said Mary Joseph and Matilda and Amelia Joseph, but the plaintiff says, in effect, that Margaret's will did not and could not affect the title to the said residential property, since by reason of a conveyance dated 3rd July 1916 it was conveyed by the then owner to Mary and Margaret as joint tenants, and upon the death of Margaret the title vested in Mary as the survivor. Purporting to explain this conveyance, the defendant alleged that the four maiden ladies had acquired the property for \$35,000 in 1916 and had each contributed equally to the payment of \$22,100 in cash and had assumed an existing mortgage for \$12,900 which was subsequently paid off by funds contributed equally by each of them; it was also alleged that the carrying charges of the property were likewise contributed equally and that the said conveyance was made in favour of Margaret and Mary as a matter of convenience only. The defendant urged that in these circumstances a resulting trust had arisen and that the beneficial interest in the property since its acquisition, ostensibly by Mary and Margaret, had been vested by operation of law in the four ladies in equal shares as tenants in common. If this contention is made out the defendant has proceeded correctly in dividing the proceeds of the said sale equally among the estates of Mary, Matilda and Amelia, because, as stated, Margaret predeceased her three sisters and left her share, if any, to them. On the other hand, if the position the plaintiff takes is tenable, then division as it affects real estate has been made upon a wrong basis, not only in Mary's estate but in the estates of Matilda and Amelia, who survived her

but are since deceased. According to the plaintiff, neither Matilda nor Amelia, nor anyone claiming under either of them, was entitled to share in the proceeds of the sale, because, it was said, such proceeds belonged only to the beneficiaries under Mary's will, of whom the plaintiff is one. Incidentally the plaintiff is the only beneficiary of five now living who takes that position, but she is entitled, nonetheless, to succeed if her contention is sound.

A resulting trust is a trust arising by operation of law, *inter alia*, where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended and is held to be equitable. This presumption, like any other, is, of course, rebuttable: see 33 Halsbury, 2nd ed. 1939, pp. 141-2. And where a person purchases property in the name of another, or in the name of himself and another jointly, then, unless there is some further intimation or indication of an intention at the time to benefit the other person, the property is as a rule deemed in equity to be held on a resulting trust for the purchaser or transferor. And the principle of implying a resulting trust applies where several persons purchase property in the name of one: see Halsbury, *loc. cit.*, pp. 149-50; *Wray v. Steele* (1814), 2 Ves. & B. 388, 35 E.R. 366.

In *McKercher v. Sanderson* (1887), 15 S.C.R. 296 at 298, Strong J. is reported to have said:

"The law is clear that in order to raise a resulting trust the party asserting it must be able to show that at the time of the completion of the purchase he either actually paid, or came under an absolute obligation to pay, the whole or some ascertained portion of the price. . . .

"But a trust thus *prima facie* resulting from the payment of an obligation to pay the purchase money may always be rebutted by parol evidence on the part of the nominal purchaser, and so on the other hand this rebutting evidence may in turn be contradicted by the same sort of evidence on the part of the alleged beneficiary, and the question to be decided may thus become a pure question of fact to be determined on the conflicting evidence alternately adduced for these purposes."

There is little or no conflict on the facts in the case at bar, the rival contentions being based upon what each party thinks is the proper inference to be drawn from the facts. The onus clearly lies upon the executor, under the order of His Honour the late Judge Klein, to bring himself, *prima facie* at least, within the requirements of the law that I have set forth above, and this, I think, he has done.

I omit from consideration until later the facts dealing with payment for this property, in favour of a brief review of the background, which, I think, is important.

Prior to 1907, besides the four ladies named there were two other unmarried sisters then alive, and they all resided together in a house at 155 Bloor Street in the city of Toronto. No one of the six sisters was shown to have ever earned any money; they lived, apparently, out of the income from their father's estate. After Elizabeth, the oldest, died in 1907, Mary obtained probate of her will, and she showed in the material filed on her behalf that Elizabeth had an interest equal to one-sixth of the probable value of the Bloor Street property, despite the fact that this property, like the Jarvis Street property, acquired later, stood registered at that time in the names of Mary and Margaret as joint tenants. Later, at the time of Annie's decease, Mary followed the same practice, in that she showed in her application for probate that the deceased had a one-fifth interest in the probable value of the same property.

The Bloor Street house was sold in December 1916 and conveyed by Mary and Margaret to one Calhoun, the purchaser, following acquisition of the Jarvis Street property in July of that year. Mr. Calhoun gave back a mortgage for part of the consideration. In 1924 Margaret died, and, again, following the identical practice, Mary showed that her deceased's sister's share in the new property was one-quarter of its probated value. This fact is important in demonstrating continuity of practice on Mary's part, but more so in that it amounts to a declaration against her own interest.

Again, Matilda, who died in 1940, declared in her will that the residence was owned by herself, by her late sister Mary—the last of her sisters to predecease her—and her sister Amelia.

When the Jarvis Street property was purchased the consideration therefor was \$35,000; \$22,100 was paid in cash and a mort-

gage for the balance was assumed. Part of the cash payment came from borrowing, but the four sisters then living contributed amongst them the sum of \$16,000. Mary's two cheques amounted to \$3,000, Margaret's cheque was for that amount, and Matilda and Amelia each gave her cheque for \$5,000. Nothing appears from the evidence to indicate why two of the sisters paid more than the other two, but it must be assumed in the absence of anything of a contrary nature that they made payment in accordance with the state of their bank balances at the time, and that the arrangement they reached in this regard was satisfactory to all. In any event, when the mortgage on the residence was paid off in 1922, each sister contributed an equal amount. It might also be added that all moneys received by the ladies' solicitors on account of the Calhoun mortgage, like the proceeds from that sale, were credited to the ladies' account in their solicitors' books, out of which payments on the mortgage on the Jarvis Street property and carrying charges generally were borne.

I am of the firm opinion that a resulting trust arose in 1916 in favour of each of the sisters then living, notwithstanding the fact that the property was conveyed to Mary and Margaret, and that nothing has been shown to rebut this presumption.

It is not without significance—and it appears clear from the evidence—that the two just named were the business women, in particular Mary in her lifetime, and it is perfectly understandable that such should be the case. That the others seemed to consider her as the business head is shown from the fact that she was named as the sole executor by each of her sisters who predeceased her. I have concluded that the conveyance was made as it was purely as a matter of convenience.

The plaintiff made no attempt to prove that the moneys advanced by Matilda and Amelia were loans to Mary and Margaret or were gifts, but it was argued that since the cheques, when received by the ladies' solicitors, were credited in their ledger under an account in the names of Mary and Margaret, it should be assumed that the moneys had become the property of the two just named. In my opinion, the solicitors, also as a matter of convenience, headed the account in their books in the names of the sisters with whom they had personal dealings, but in any event how the solicitors handled the moneys after they received them could not affect the matter. In the circumstances, taken

together with the background I have described, I cannot bring my mind to any conclusion other than that the sisters regarded themselves as equal co-owners of the houses in which they successively resided, and hence that in dividing the proceeds of the sale of the Jarvis Street property among the estates of Mary, Matilda and Amelia, the executor has proceeded on the correct and proper basis. Each estate is entitled, in my view, to one-third of such proceeds.

I consider it unnecessary to deal with the other defences set up by the executor.

The question of costs has given me some difficulty, but in the circumstances I have decided that the costs of the executor should be borne by the estate as between solicitor and client, and that there should be no further order as to costs.

Judgment accordingly.

Solicitors for the plaintiff: Hughes, Agar, Thompson & Amys, Toronto.

Solicitors for the defendants: Smith, Rae, Greer & Cartwright, Toronto.

[URQUHART J.]

Re Porcupine Gold Reef Mining Company Limited.

Companies—Surrender of Charter—Effect of Provincial Secretary's Declaration as to Effective Date—Purported Extension—Voluntary Winding-up Commenced and Order then Sought for Winding-up under Supervision of Court—Insufficiency of Reasons Advanced—The Companies Act, R.S.O. 1937, c. 251, ss. 3, 32, 193—The Interpretation Act, R.S.O. 1937, c. 1, s. 29(g).

Where a company surrenders its charter, and the Provincial Secretary makes an order, under ss. 3 and 32 of the Ontario Companies Act, directing that the dissolution of the company shall take effect on a day named, there is no power in the Provincial Secretary later to vary that direction by extending the date, and such purported extension will not be effective to prevent the company's ceasing to exist on the date originally named.

The words "contributories" and "creditors" in s. 193(b) of the Ontario Companies Act must be construed in their strict sense, and if a company has no creditors or contributories in that sense the clause is inapplicable. *Embree v. Millar* (1917), 11 Alta. L.R. 127; *Rex v. Rash* (1923), 53 O.L.R. 245, referred to.

A PETITION for an order for the winding-up of a company by order of the Court, and other relief.

22nd January 1946. The motion was heard by URQUHART J. in chambers at Toronto.

D. R. Michener, K.C., for the liquidator, petitioner.

J. R. Cartwright, K.C., for persons served as representing the company.

G. D. Watson, for a number of shareholders opposed to the petition.

30th January 1946. URQUHART J.: Petition by Geo. S. Holmsted Esq., who was appointed liquidator of the company under the voluntary winding-up sections of The Companies Act, R.S.O. 1937, c. 251, at a meeting of the shareholders of the company called after requisition made on 11th October 1945, and held on 17th November 1945, for an order: (1) that the company may be wound up by order of the Court; (2) confirming the petitioner as liquidator and certain inspectors as such; (3) referring it to the Master to take necessary steps and exercise such powers as may seem proper to wind up the company; (4) providing for costs, or (5) other relief.

The petition was served upon the last president and the last secretary of the company, who have appeared to oppose same.

The grounds advanced to justify the making of the order are:

1. There is a strong presumption that the directors or some of them have acted improperly in their dealings with the asset of

449,619 shares of Porcupine Reef Gold Mines Limited, which are said to have a value of 50 cents per share. This alleged market value, however, is very doubtful.

2. The shareholders have expressed a desire for winding-up.

3. Proceedings by the directors were in defiance of their wishes.

4. The meeting which is the basis of the sale of the asset is irregular due to lack of proper notice or inadequate notice.

5. Shares in a new company were subsequently allotted at one-tenth of their value to directors of the company whose winding-up was sought, or their proxies.

The granting of the petition is opposed on these grounds, which I have taken in a different order from that in which the case was presented:

1. That the whole foundation of the liquidator's appointment, *viz.*, the meeting of 17th November 1945, is bad in that the requisition of the shareholders which is alleged to have justified the meeting did not comply with s. 47 of The Companies Act. It is alleged that the requisition was not signed by 10 per cent. of the shareholders. Without going into the matter at length, I must decide this point adversely to the contestants.

I am of opinion that all those who signed were entitled to sign, and that they represented well over the required 10 per cent., and that the meeting was properly called and proceedings thereat properly transacted (*i.e.*, assuming for that purpose that ground no. 3, hereafter to be discussed, is decided against the respondents).

2. (a) That assuming that there is nothing in objection no. 3, there is nothing for the liquidator to do but to dispose of 449,619 shares of Porcupine Reef Gold Mines Limited, or what remains of them, which are the sole asset of the company. The expenses of the distribution have been provided for.

(b) That assuming the above, s. 193 of The Companies Act does not contemplate or authorize any such application.

(c) That there is no necessity for the intervention of the Court.

(d) That over 260 shareholders, or about one-third of the whole number, have transferred their shares (part of the 449,619 above mentioned) and taken stock in a new company, Huclif Por-

cupine Mines Limited, and that there could not now be rescission in that there is no way to put back the shares.

Section 193 of The Companies Act, provides:

"A corporation may be wound up by order of the Supreme Court,—

"(a) where it may be wound up voluntarily;

"(b) where proceedings have been begun to wind up voluntarily and it appears to the Court that it is in the interest of contributories and creditors that they should be continued under the supervision of the Court;

"(c) where in the opinion of the Court it is just and equitable for some reason other than the bankruptcy or insolvency of the corporation that it should be wound up;

"(d) where the letters patent have been declared forfeited or revoked or made void."

I will discuss this ground (2) later.

(3) That an order was made on application for surrender of the charter effective as of a certain date, 5th November 1945, and that although the Provincial Secretary has sought to extend the operative date on two occasions, he had no power to do so, being *functus officio*, and that the corporation having parted with its assets and surrendered its charter, it is dissolved and the Court can make no order against it.

The history of the transactions of which the liquidator, as representing the dissenting shareholders, complains, is long, and there seems to be little point in reviewing it in this judgment unless the order is to be made.

The connection of two of the directors with the present company and the Huclif company gives rise to suspicion that all is not as it should be, and if they actually got an advantage, as alleged, then the suspicion is intensified. That there was an advantage, however, remains far from clear, as the value of the stock is problematical. The meeting also may have been called on less than the authorized notice and the notice given probably set out insufficiently the business to be transacted thereat. A recipient of the notice might throw it aside with the thought that it was just another annual meeting.

In the view that I take of the matter, I need not go into any discussion of the merits, as they may become the subject of an action at a later date.

Objections 2 and 3 appear to me to stand in the way of the petitioner's success. In support of his application the liquidator invokes clauses (a), (b) or (c) of s. 193 of The Companies Act.

In regard to (a), I am of opinion that this does not mean that a voluntary winding-up can automatically be turned into winding-up under the order of the Court. The section means that the Court may order a winding-up in cases where the company may be wound up voluntarily.

Here we have the applicant appointed a liquidator of a company which has parted with all its assets except 449,619 shares of another company. All he is required to do is to distribute these assets—expenses of the distribution are even provided for. The intervention of the Court is not needed to assist in such.

Under the "just and equitable" rule (clause (c)), the Courts of our Province have been very chary about making orders. As is pointed out by the late Mr. Wegenast in his book on Canadian Companies, at p. 104, the more recent Ontario decisions exhibit a marked indisposition to give effect to the "just and equitable" item, either on the ground of deadlock or otherwise.

The whole section, read as one section, seems to indicate that clauses (a) and (c) are only resorted to when application is made in the first instance, and not where the liquidator has started upon his duties.

Turning to clause (b), this clause clearly applies after liquidation has been voluntarily begun, and therefore the liquidator, if properly appointed, may, if he can, invoke this clause. It however, is also limited in scope, and it must appear to the Court that the continuation under the Court is in the interest of contributories and creditors.

The company has no creditors in the strict sense of the word, nor has it any contributories in the sense that any shareholder has still to pay on his stock.

Have the terms a wider meaning? The applicant refers to *Embree v. Millar*, 11 Alta. L.R. 127 at 133, [1917] 1 W.W.R. 1200 at 1204, 33 D.L.R. 331, where Beck J. in the Court of Appeal said: "Shareholders are creditors of the corporation in its winding-up or dissolution after the payment of all its other obligations."

The word "creditor" is used in many places in The Companies Act, *e.g.*, ss. 32(1) (c); 34(1), (2); 74(1); 93(2); 180(b); 183; 188; 194; 197, and 200(3).

The word "contributory" is used first in the side-note to s. 173, which reads:—

"The liability of any person to contribute to the assets of a corporation under this Act, in the event of the same being wound up, shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability."

In the next section the word occurs in two places, with the above meaning. The word also occurs in ss. 180(*g*), (*h*) and (*i*); 183, 189, 194, 197, 200(3) and 203.

It will be seen by an examination of the above sections, that, in many instances, the words "creditors" and "contributories" are used in direct contrast to the word "shareholders" and, therefore, I am of opinion that the above case cannot apply to the interpretation of s. 193, and the words used in that section must refer to contributories and creditors in the understood sense of the terms.

In *Rex v. Rash* (1923), 53 O.L.R. 245 at 252, 41 C.C.C. 215, Masten J. said that when the word "creditor" is used in a statute, and is not expressly or by implication given any more extensive meaning, it is to be confined to "one to whom a debt is owing—correlative to debtor."

Objection no. 3 is also most formidable, and if given effect to defeats the motion in itself, because the company will be deemed to have ceased to exist (a) before the meeting appointing the liquidator was called, and (b) before the petition was launched.

The resolution passed at the meeting authorizing the sale of the asset above mentioned also authorized the surrender of the charter. The company had no assets after the shares were disposed of, nor had it creditors, and there seemed to be no reason why the charter should not be surrendered.

Surrender of a charter is provided for by s. 32 of the Act. This section reads as follows:

"(1) The charter of a corporation incorporated by letters patent may be surrendered if the corporation proves to the satisfaction of the Lieutenant-Governor,—

"(a) that it has no debts or obligations; or

"(b) that it has parted with its property, divided its assets rateably amongst its shareholders or members and has no debts or liabilities; or,

“(c) that the debts and obligations of the corporation have been duly provided for or protected or that the creditors of the corporation or other persons holding them consent; and

“(d) that the corporation has given notice of the application for leave to surrender by publishing the same once in the *Ontario Gazette* and once in a newspaper published at or as near as may be to the place where the corporation has its head office.

“(2) The Lieutenant-Governor, upon a due compliance with the provisions of this section, may accept a surrender of the charter and direct its cancellation, and fix a date upon and from which the corporation shall be dissolved, and the corporation shall thereby and thereupon become dissolved accordingly.”

Section 3 of the Act also comes into play:

“3. The Provincial Secretary may, under the seal of his office, have, use, exercise and enjoy any power, right or authority conferred by this Act on the Lieutenant-Governor but not those conferred on the Lieutenant-Governor in Council.”

The body of the letters patent dealing with the surrender, dated the 12th day of October 1945, reads as follows:

“NOW THEREFORE KNOW YE that I, GEORGE HARRISON DUNBAR, Provincial Secretary, under the authority of the hereinbefore in part recited Act HEREBY DIRECT the cancellation of the charter of PORCUPINE GOLD REEF MINING COMPANY LIMITED, incorporated by Letters Patent dated the tenth day of January, A.D. 1910, and fix the fifth day of November, A.D. 1945, as the date upon and from which the said Corporation shall be dissolved, and the Corporation shall thereby and thereupon become dissolved accordingly.”

The words of the letters are, therefore, quite definite, and a definite date is fixed for the dissolution of the corporation. The respondents argued that this order, once and for all, ordains the dissolution and fixes the date thereof, and that nothing further can be done by the officer so decreeing; that he is *functus*, in other words.

Evidently some one brought it to the attention of the Provincial Secretary that there was some question as to the surrender because the “direction”, as he calls it, was altered by him on 3rd November 1945, by deleting the words “November 1945”, and substituting the words “February 1946” therefor. What caused him to do that does not appear. Then, later, the time was again

extended by a "direction" under the hand of the Provincial Secretary, and the seal of his office, purporting to extend again, by deletion and substitution, the time of dissolution to 5th February 1947. The words used are interesting. After reciting the direction for cancellation and the first-mentioned alteration thereof, the "direction" proceeds:

"AND WHEREAS it has been represented to me that a petition to wind up the said Corporation, PORCUPINE GOLD REEF MINING COMPANY LIMITED, has been filed in the Supreme Court of Ontario and that the said Petition is now pending in the Supreme Court of Ontario;

"AND WHEREAS it appears to me to be advisable that the matters in controversy should be adjudicated by the Court;

"NOW THEREFORE KNOW YE that I, GEORGE HARRISON DUNBAR, HEREBY alter the said direction as amended by deleting the words and figures 'the fifth day of February, A.D. 1946' and substituting the words and figures 'the fifth day of February, A.D. 1947'.

"GIVEN under my hand and Seal of Office at the City of Toronto in the said Province of Ontario this eleventh day of January in the year of Our Lord one thousand nine hundred and forty-six.

"G. H. DUNBAR,
"Provincial Secretary".

Has the dissolution been suspended until 5th February 1947, or was the company dissolved last November?

Section 32(2) seems to imply that the act of the Lieutenant-Governor or the Provincial Secretary for him, shall be final. It is a definite single act, and does not involve continuing powers.

By s. 29(g) of The Interpretation Act, R.S.O. 1937, c. 1, it is provided that "if power is conferred to make by-laws, regulations, rules or orders, it shall include power to alter or revoke the same from time to time and make others".

The wording of that clause seems to give power to alter or revoke something that is continuing, or which governs indefinite (and not definite) future matters. By-laws, regulations and rules are clearly in that category. "Order" seems also to be of that nature. They all appear to be of the same *genus*.

There seems to be no authority directly in point. I am referred by counsel to two unreported decisions.

The petitioner refers to the case of *Cripps v. Arrow Coach Lines Limited*, decided in October 1929 by the then Master and upheld by Raney J. The motion in that case was to set aside a writ of summons on the ground that the defendant (a corporation) had no legal existence. Surrender of the company's charter was accepted on 12th March 1928, and the dissolution date was set for 9th April 1928. The plaintiff had a claim against the company and made representations to the Provincial Secretary, who, on 19th October 1929, made an order rescinding that of March 1928. The Master said:

"Evidently the proper officials were convinced that the order of March 12th, 1928, had been made under circumstances which had not justified them in making the order, and the later order would appear to be similar to the practice of the Supreme Court of rescinding an *ex parte* order where it is shown that the facts did not justify such an order being made.

"In the absence of any authority in support of the contention that the order of October 19, 1929, is irregular, I would dismiss the motion. . . ."

That decision, however, was on a point of practice, the gist of it being the striking out of a writ of summons. Upon the motion the Master would not attempt to decide any question of law which was against the plaintiff, and therefore the authority, though cogent, would not have the binding effect which a decision after a trial would have.

In dismissing the appeal Raney J. gave no reasons, as I am advised.

The respondents refer to an unreported decision by McTague J., said to be to the contrary. That case is *In re Caer-Howell Investments Limited*, decided 15th May 1938. The application in that case was made on behalf of certain creditors for an order directing that the winding-up of the company be continued under the supervision of the Court and declaring that the company had not been fully wound up and had not in fact been dissolved, and for an order appointing a liquidator, etc.

A liquidator had been appointed and letters patent had been returned to the Provincial Secretary in December 1933. There had, however, been an overdue mortgage of a large amount in respect of which the corporation was still liable. McTague J.A. dismissed the motion with costs, without prejudice to any action

that the applicant might be advised to take in relation to the questions involved. Section 208 of The Companies Act had come into play.

In *Christie et al. v. Edwards*, [1939] O.R. 48, [1939] 1 D.L.R. 158, Roach J. granted relief notwithstanding that the company in question had for several years been wound up under s. 208. The Court of Appeal, however, allowed an appeal, [1940] O.R. 28, [1939] 4 D.L.R. 139. McTague J.A. gave the principal judgment, and, after referring to the voluntary winding-up and dissolution as of March 1933, said, "Section 208 is mandatory unless the person claiming relief can show fraud", and "there is no such company as Erwik Estates Ltd., no shareholders thereof and the liquidator as such is *functus officio*." This judgment was reversed on other grounds, [1940] S.C.R. 410, [1940] 3 D.L.R. 65.

The machinery of s. 208 and of s. 32 for dissolving a company being so different, neither of the above cases is exactly in point, but the above remarks of McTague J.A. are helpful.

As I have said, since the above mentioned decision of Raney J. is really on a point of practice, I feel that I am not bound to follow the reasons of the Master, as I see no analogy between the position of the Provincial Secretary and that of the Court. I am, therefore, of opinion that once the cancellation of the charter under the surrender section is directed, and once the date of dissolution has been fixed and letters patent to that effect have been issued, the Provincial Secretary cannot alter the same and the corporation is dissolved as of the date set.

So on that ground alone the petition must fail.

Dealing with the question propounded by Mr. Watson, it would be unfair to the shareholders represented by him—a very substantial block—to allow the liquidator to pursue costly investigations and engage in litigation in which, if he were unsuccessful, or even in case of success, considerable inroads might be made upon the assets in which they have now a definite interest, and which they wish to accept intact.

The liquidator asks for his costs out of the assets. I intimated that even if the petition were successful, so far as I was concerned, the assets must remain unimpaired and those backing the liquidator must be responsible for his costs.

In addition to the above reasons, there is also the fact that the assets cannot now be put back in their original form.

The petition will be dismissed, but, I think, without costs. There is a considerable amount of suspicion arising out of the matter, and the meeting referred to above was to a certain extent irregular, so that costs would not be awarded to the company's representatives. Mr. Watson's clients appeared gratuitously and unnecessarily as it turned out. Any costs incurred by the liquidator must be borne by those who backed him on this application. The dismissal is to be without prejudice to any action that may be taken in relation to the questions involved.

Petition dismissed without costs.

Solicitors for the liquidator, applicant: Lang, Michener & Ricketts, Toronto.

Solicitors for persons served with notice: Smith, Rae, Greer & Cartwright, Toronto.

[COURT OF APPEAL.]

Mowder v. Roy.

Husband and Wife—Criminal Conversation and Alienation of Affections—Whether Cause of Action for Crim. Con. Exists in Ontario—Measure of Damages—Matters to be Considered in Assessment.

An action for damages for criminal conversation can be brought in Ontario. Section 59 of The Matrimonial Causes Act, 1857 (Imp.), c. 85, does not operate here so as to take away the right to bring such an action.

The fact that a wife's adultery has been caused or contributed to by the husband's own infidelity or misconduct, provided he has not been a privy to the act of adultery on which his action is founded, does not deprive him of his right to sue for criminal conversation, but goes only to the question of damages. *Bromley v. Wallace* (1803), 4 Esp. 237; *Winter v. Henn* (1831), 4 C. & P. 494, applied. But if the defendant establishes by evidence that the plaintiff, in pursuance of a scheme or plot, either alone or in concert with another or others, has contrived to bring about the injury for which he now seeks compensation, the action must fail; the plaintiff cannot recover damages grounded on his own turpitude.

In assessing damages in an action for criminal conversation, the following rules should be kept in mind: (1) Damages are compensatory only, and exemplary or punitive damages may not be awarded. (2) The two main considerations are the actual value of the wife to the husband, and the proper compensation to the husband for the injury to his feelings, the blow to his marital honour, and the serious hurt to his matrimonial and family life. (3) The value of the wife has two aspects, the pecuniary aspect and the "*consortium*" aspect. (4) The whole character of both the wife and the husband is in issue. (5) The ease or difficulty with which the defendant gained his desire, and his conduct in general, may be a most direct aid in determining the wife's value from the aspect of *consortium*; likewise, the blow to the husband, and the shock to his feelings, depend to a large extent upon the conduct of the defendant. *Butterworth v. Butterworth and Englefield*, [1920] P. 126, applied; *Ewer v. Ewer and Charlton* (1920), 36 T.L.R. 517, referred to.

An action for alienation of affections, though unknown to the law of England, is recognized by the law of Ontario. *Bannister v. Thompson* (1913), 29 O.L.R. 562, varied (1914), 32 O.L.R. 34, applied. The quantum of damages recoverable is proportionate to the value of the wife's affections in the particular case under consideration, and it is for the jury to measure the extent of the loss, if any, caused by the defendant's misconduct. The defendant may show that when he first became acquainted with the plaintiff's wife, the plaintiff no longer possessed her affections or *consortium*, in whole or in part, and that the loss had been wholly or partly occasioned by his own behaviour, her own determination, or a combination of the two. Here, as in the action for crim. con., the conduct of both parties is in issue, and all relevant circumstances may be shown in evidence. Punitive damages cannot be awarded. *Marangos v. Harold* (1922), 52 O.L.R. 395, applied. If no loss has been sustained by the plaintiff by reason of the defendant's acts, the jury are not entitled to award any damages.

AN APPEAL by the defendant from the judgment of LeBel J., entered after a trial with a jury, in an action for damages for criminal conversation and alienation of affections.

10th, 11th, 12th and 13th December 1945. The appeal was heard by HENDERSON, LAIDLAW and ROACH JJ.A.

A. G. Slaght, K.C., for the defendant, appellant: The verdict was perverse, and such as reasonable men could not have found on the evidence. Mrs. Mowder's evidence as to her relations with the plaintiff was not adequately considered [LAIDLAW J.A.: That evidence might justify a finding that the plaintiff had lost his wife's affections as a result of his own conduct, not that of the defendant, but the trial judge expressly left that issue to the jury, and is not their verdict a finding against the defendant on that point?] Only if the trial judge presented it adequately to them. The jury here were left in confusion, and not clearly told that they might find that the affection had been lost through the plaintiff's own conduct, or the wife's own volition, or a combination of both.

There was no believable evidence to support a finding of adultery. The evidence of Mrs. Flowers was quite incredible, in the circumstances, and she had an obvious motive for injuring the defendant.

The jury should have been discharged because of the prejudicial newspaper article, published during the trial. The article refers to a "retrial" and states the amount of damages awarded at the first trial. This may have influenced the jury. It refers wrongly to the motion for a change of venue. The position is the same as if inadmissible evidence had been given: Phipson on Evidence, 7th ed. 1930, p. 484; *Sheppard v. Macinnis and Cana-*

dian Industries Limited, [1933] O.W.N. 395. [LAIDLAW J.A.: In both those cases, the jury learned of something that they are expressly prohibited from knowing.] I submit that the position is the same. I refer also to *Stewart v. Woolman* (1895), 26 O.R. 714 at 720. [ROACH J.A.: *Rex v. McDonald*, [1940] O.R. 7, [1939] 4 D.L.R. 377, 72 C.C.C. 351, is against your contention on this point.] That case is distinguishable in several respects.

No action for criminal conversation will lie in Ontario. It was abolished in England by s. 59 of The Matrimonial Causes Act, 1857, c. 85, and this Act still has the force of law in Canada. The Divorce Act (Ontario), 1930 (Dom.), c. 14 introduced the English law as it existed in 1870, *i.e.*, after the abolition there of the cause of action, and the substitution of a claim for damages against an adulterer in an action for divorce. This was adopted by the Province by The Marriage Act, 1933 (Ont.), c. 29, now s. 35 of R.S.O. 1937, c. 207. [LAIDLAW J.A.: Does the 1930 Dominion Act introduce the English law as amended? Section 59 of The Matrimonial Causes Act, 1857, was repealed in 1892, before the introduction into Ontario.] [ROACH J.A.: Surely the law "as to the dissolution of marriage", introduced by the 1930 Act, does not include anything as to criminal conversation, which was a common law action.] The 1857 statute substituted a claim in divorce actions for the separate cause of action: *Marson v. Coulter* (1910), 3 Sask. L.R. 485 at 488, 16 W.L.R. 157. [ROACH J.A.: What is the effect of s. 52 of The Judicature Act, R.S.O. 1937, c. 100, which expressly refers, *inter alia*, to the trial of an action for criminal conversation?] That was inserted in our law before the introduction of English law in 1930.

The trial judge misdirected the jury as to the degree of proof required of the plaintiff: *Earnshaw v. Dominion of Canada General Insurance Company*, [1943] O.R. 385 at 392, [1943] 3 D.L.R. 163, 80 C.C.C. 35, 10 I.L.R. 143. [ROACH J.A.: We are not concerned here with an allegation of crime.] Adultery is quasi-criminal. In any case, a "strong probability" is not enough. [ROACH J.A.: A preponderance of evidence is enough, and a "strong probability" is more than that.] The jury were not impressed with the seriousness of the charge against the defendant: *Robins v. National Trust Company Limited*, [1927] A.C. 514 at 520, [1927] 1 W.W.R. 692, 881, [1927] 2 D.L.R. 97.

As to the powers and functions of an appellate Court where the verdict is perverse, I refer to *The Metropolitan Railway Company v. Wright* (1886), 11 App. Cas. 152 at 154-5; *Cox v. English, Scottish and Australian Bank Limited*, [1905] A.C. 168; *Mechanical and General Inventions Company, Limited et al. v. Austin et al.*, [1935] A.C. 347 at 369.

The charge to the jury did not deal adequately with our submission that there had been a plot between the plaintiff and his wife. As to the trial judge's duty in this respect, I rely on *Spencer v. The Alaska Packers Association* (1904), 35 S.C.R. 362 at 370-1, adopted in *Bronson v. Evans and Evans*, [1943] O.R. 248, [1943] 2 D.L.R. 371. There should have been a specific question for the jury as to whether, if adultery did take place, it was as the result of a plot or scheme to bring it about, or whether the plaintiff was barred by his own conduct from recovering: *Pearl v. Pearl and Lees*, [1943] O.R. 720, [1943] 4 D.L.R. 387. In this respect, the same rules apply in an action for criminal conversation as in an action for divorce. [LAIDLAW J.A.: The facts in the *Pearl* case were much stronger than they are here.] Yes, but the principles there laid down are equally applicable. [LAIDLAW J.A.: Your contention is that if a man, by his own conduct, contributes to his wife's infidelity, he cannot hold another man wholly responsible?] Yes, and that should have been left to the jury. It was not even properly put before them on the question of damages.

The trial judge did not tell the jury that they should consider the evidence as to venereal disease in connection with damages.

There was a wrongful rejection of evidence. Anything Mrs. Mowder told the defendant about her feelings for her husband was admissible.

R. I. Ferguson, K.C., for the defendant, appellant: The statement of claim alleges adultery on 5th, 6th and 7th June. The general allegation, covering a period of time, does not refer to adultery, but only to other acts. Even if the period does relate to adultery, the use of the words "and in particular" in the pleading restricts the plaintiff to those particular days, and if the jury do not find that adultery has been committed on one of those days, the plaintiff is not entitled to a verdict. As to the particularity required in pleading, I refer to Form 5 of the Rules of Practice, and Odgers on Pleading and Practice, 12th ed. 1939, p. 119. [HENDERSON J.A.: You knew, at least from the time of the first trial, that

the crucial date was the night of 29th-30th May.] The plaintiff should have amended his pleading after the first trial.

Evidence was not admissible of special damages resulting from the loss of the wife's assistance in the store. Her services as a partner are not included in a general claim for loss of *consortium*: *Harcourt v. Solloway Mills & Co. Ltd.* (1931), 40 O.W.N. 214.

As to the claim based on alienation, the jury should have been told that if the plaintiff's wife left him because of something he did, or for any reason not connected with the defendant, it was an end of the case on this branch: Lush on Husband and Wife, 4th ed. 1933, p. 35. On this branch, we rely also on *Newton v. Hardy et al.* (1933), 149 L.T. 165 at 168, following *Butterworth v. Butterworth and Englefield*, [1920] P. 126; Salmond on Torts, 10th ed. 1945, pp. 367-8.

J. J. Robinette, K.C., for the plaintiff, respondent: It should be remembered that this action was tried, at the defendant's request, by a special jury.

As to the existence of a cause of action for criminal conversation: All that the Dominion statute of 1930 introduced into Ontario was the law of England as to dissolution and annulment of marriages; it did not introduce the whole law relating to matrimonial causes. The common law action has nothing to do with either dissolution or annulment. The history of the action is discussed in *Butterworth v. Butterworth and Englefield*, [1920] P. 126. The Matrimonial Causes Act, 1857, deals with many matters which cannot be said to have been introduced here by the 1930 Act. Reading ss. 59 and 63 of that Act together, the provision is purely procedural, and the practice, as opposed to the substantive law, was not introduced into Ontario.

The right to maintain an action for criminal conversation is a matter of property and civil rights, governed by Provincial law: *Mitchell v. Mitchell and Croome*, 44 Man. R. 23, [1936] 1 W.W.R. 553, [1936] 2 D.L.R. 374; *Elkowech v. Elkowech et al.*, 16 Alta. L.R. 519, [1921] 2 W.W.R. 345, 61 D.L.R. 160. The English law applicable is therefore that of 1792, under The Property and Civil Rights Act, R.S.O. 1937, c. 145.

As to the admissibility of evidence as to the night 29th-30th May, para. 6 of the statement of claim covers a period including this date, and no particulars were asked for. *Somers v. Kingsbury*, 54 O.L.R. 166, [1924] 2 D.L.R. 195, establishes that this is

a proper course in an action for criminal conversation. Divorce actions are governed by special rules. In any case, the defendant's counsel at the trial expressly admitted that he was not taken by surprise in this connection.

The trial judge's charge as to the burden of proof was correct. Generally, he refers to "a strong probability", but as to crim. con. he expressly points out that there is a heavier burden.

The true issue as to alienation was properly left to the jury. The questions submitted were agreed to by counsel. The loss of the wife's affections, not amounting to loss of *consortium*, affects damage only. The trial judge plainly told the jury that the gist of the action on this branch was the loss of affections by reason of the defendant's conduct. The verdict of the jury is an express finding that this loss was caused by the defendant, and shows that they disbelieved Mrs. Mowder's evidence on this point. The question of venereal disease was put to the jury with reference to credibility, and also in connection with alienation and with damages.

There was nothing in the defendant's pleading to suggest a plot by the plaintiff, and no objection to the charge on this point was taken at the trial. It was not suggested to the jury by counsel that Mrs. Mowder was party to such a scheme, and there is no evidence that she was. The matter of the plaintiff having a deliberate design in his own mind was fully and adequately left to them. A failure to object at the trial, in case of non-direction, is fatal to the right to raise the point on appeal: *Thompson v. Fraser Companies, Limited*, [1930] S.C.R. 109, [1929] 3 D.L.R. 778. [HENDERSON J.A.: The Court does not require to hear argument from you as to the finding that adultery was committed on 30th May, or as to the effect of the newspaper article.]

Our case is that the alienation started in January 1943, and the important evidence as to the affection existing between Mowder and his wife is what refers to a time before that date. The plaintiff's evidence that they were a happy couple is confirmed by that of neighbours, and by that of the defendant himself.

The jury did not believe the wife's evidence either when she denied the fact of adultery, when she said that she had no affection for her husband, or when she said that he was plotting to involve the defendant. In any case, there was no evidence that she was

a party to such a plot. [LAIDLAW J.A.: Why was it not proper to ask Mrs. Mowder, in connection with the plaintiff's letter to her, what was "in the back of their minds"?] Even if there was a plot at that time, the defendant's evidence is that he had been warned of it at the end of February, and, in view of that evidence, the subsequent story is incredible. The trial judge ruled correctly that Mrs. Mowder might be examined about facts, but not about what was in her mind. [LAIDLAW J.A.: Surely what was in her mind was a fact.]

This case turns largely on the credibility of witnesses, and this Court cannot say that the verdict is perverse because the witnesses should not have been believed. The findings of a jury as to the credibility of witnesses cannot be reviewed: *Toronto Railway Company v. The King*, [1908] A.C. 260, C.R. [1908] A.C. 326, 12 O.W.R. 40, 7 C.R.C. 408; *McCannell v. McLean*, [1937] S.C.R. 341 at 343, [1937] 2 D.L.R. 639. A "perverse" verdict is one where the inferences drawn by the jury from the proved facts are utterly unreasonable: *Laporte v. The Canadian Pacific Railway Co.*, [1924] S.C.R. 278, [1924] 4 D.L.R. 110.

The damages awarded by the jury are not excessive or shocking, and should not be interfered with by this Court.

The essence of criminal conversation is the invasion of marital honour and of the husband's exclusive right to have sexual intercourse with his wife. It is not in any sense the loss of *consortium*. Even if the woman is separated from her husband, the action will lie: *Maguire v. Maguire*, (1921) 50 O.L.R. 579, 64 D.L.R. 564; *Marangos v. Harold*, 52 O.L.R. 395, [1923] 4 D.L.R. 520.

A. W. S. Greer, for the plaintiff, respondent: In *Telford v. Secord*; *Nasmith v. Telford*, [1945] 4 D.L.R. 450, this Court laid it down that (1) objections to the charge should be taken at the trial, and, if not so taken, cannot thereafter be raised; and (2) that the Court should not interfere with the jury's findings of fact. See also *Storry v. Canadian National Railway Company*, [1941] 4 D.L.R. 169, 53 C.R.T.C. 71, there cited.

As to the allegation of a plot, the jury must have taken into consideration; (1) the defendant's admission that he and Mrs. Mowder had spent the night of 29th-30th May in the same part of the house; (2) his statement that Flowers had not known that he was to be there that night; and (3) other evidence indicating that it was not known that the defendant would be at the farm that night.

The jury, in estimating the value of the defence as a whole, were entitled to take into consideration the fact that there were seven distinct pieces of evidence introduced for the first time at the second trial, although the defendant admitted that he had known of them at the time of the first trial.

As to the functions of an appellate tribunal where it is suggested that the verdict is perverse, I refer to *The Metropolitan Railway Company v. Wright* (1886), 11 App. Cas. 152 at 154-5; *Beckett v. Grand Trunk Railway Company* (1886), 13 O.A.R. 174 at 184; *Blue & Deschamps v. Red Mountain Railway Company*, [1909] A.C. 361 at 368, C.R. [1909] A.C. 210, 9 C.R.C. 140; *Storry v. Canadian National Railway Company*, *supra*, at pp. 172-4, 178.

Section 27(1) of The Judicature Act, R.S.O. 1937, c. 100, should be applied here; the Court cannot say that there has been a substantial wrong or miscarriage of justice: *Jenkins v. Morris* (1880), 14 Ch. D. 674 at 681, 683, 685; *Fingland v. Brown and Garon*, [1943] O.R. 13 at 24, 26, [1943] 1 D.L.R. 176. If the Court comes to the conclusion that the assessment of damages cannot stand, it has power to re-assess them, and should do so rather than order a new trial: *Doan v. Neff* (1916), 38 O.L.R. 216. If consent is required, the plaintiff consents.

A. G. Slaght, K.C., in reply: *Telford v. Secord*, *supra*, refers to objections, not to the judge's charge, but to opposing counsel's address to the jury. The law as to objections to the charge is settled in *Brenner v. The Toronto Railway* (1907), 15 O.L.R. 195 at 198, affirmed (1908), 40 S.C.R. 540.

As to the evidence given on the second trial, and not on the first, Mrs. Mowder states in her evidence that she told counsel many things that he did not use at the first trial. It was apparently an exercise of counsel's discretion.

It is immaterial whether criminal conversation is regarded as part of the law as to the dissolution of marriage, or as property and civil rights, because The Property and Civil Rights Act introduces the English law of 1792, except so far as it has been since repealed, modified, etc. The preamble of The Matrimonial Causes Act, 1857, makes this a part of the law relating to dissolution.

It is not safe, if the Court thinks that evidence was wrongly rejected, or that the jury was misdirected on an important matter, to say that there has been no substantial wrong or miscarriage.

If the Court thinks there should be a new trial, it should be elsewhere than in the county of Ontario. Authority for this course may be found in *Alexander v. Canadian National Railway Co.*, 65 O.L.R. 162 at 167, [1930] 3 D.L.R. 140, 36 C.R.C. 404.

We cannot consent to an assessment of damages by this Court.

Cur. adv. vult.

1st February 1946. HENDERSON J.A.:—This is an appeal from the judgment of the Honourable Mr. Justice LeBel dated 8th March 1945, following the verdict of a jury after the second trial of the action at Whitby.

As in my view there must be a new trial, it is undesirable to discuss the features of this case at any length, as doing so might embarrass the future trial.

The questions submitted to the jury, and their answers, are as follows:

“(1) Was there any adultery committed between the defendant and the plaintiff's wife? A. Yes.

“(2) If so, when and where was such adultery committed? A. Adultery was committed at the Roy farm on May 30th, 1943.

“(3) If your answer to question 1 is ‘yes’, at what amount do you assess the damages for adultery? A. \$4,000.

“(4) Was there any alienation of the affections of the plaintiff's wife by the defendant? A. Yes.

“(5) If your answer to question 4 is ‘yes’, at what amount do you assess the damages for alienation? A. \$6,000.”

Upon the hearing of the appeal we were all of the opinion that there was evidence to support the findings of the jury in answer to questions 1 and 2, and counsel were so advised, but this relief was limited to the fact there found, and we made it clear that it did not follow that the finding of the jury as to question 3 could be supported.

I have said that in my view there must be a new trial and it is upon the simple ground that no jury of twelve reasonable men, mindful of their oath to find a true verdict according to the evidence, could possibly have returned the verdict which is appealed against. There is an old maxim that a plaintiff who comes into court crying for justice must come with clean hands, and I can find in the record no explanation from the plaintiff of his letter, which is Ex. 7, and the enclosure, which is Ex. 8.

It would appear to be useless to send the case back for a new trial at Whitby, and I was inclined to think that an order should issue changing the place of trial to another county town, or city, in eastern Ontario. My brothers Laidlaw and Roach, however, are of opinion that the order should provide for a change of the place of trial to Toronto, and I therefore agree.

I also agree with the disposition of costs made by my brother Laidlaw.

LAIDLAW J.A.:—The defendant in an action for damages for criminal conversation and alienation of affections appeals from a judgment of LeBel J. dated the 8th day of March 1945, after a second trial with a jury at the town of Whitby. The jury answered questions as follows [see *supra*].

The principal grounds of appeal are:

1. No action can be maintained for criminal conversation.
2. The verdict of the jury is perverse.
3. There was misdirection and non-direction by the learned trial judge in his charge to the jury.
4. The trial was unfair to the defendant because of the contents of an article published in a newspaper at the place of and during the trial.
5. The amount of damages assessed by the jury is excessive.

The respondent married his wife in 1932. He was then 33 years of age and she was 22. He was a travelling salesman of tea and lived in the town of Stouffville, Ontario. She was a clerk in a general store in Uxbridge, and lived in that town. After their marriage the respondent and his wife lived at Uxbridge until the spring of 1933, when they moved to the village of Myrtle. In the fall of 1933 the respondent commenced farming and he and his wife then moved to a farm situate about a mile and a half east of Claremount, a village having a population of about 400. He continued farming until March 1942. At that time he took over the business of a general store in Claremount and commenced with his wife to operate it.

The appellant is a married man residing with his wife in the city of Toronto. He is 49 years old and carries on business in Toronto as a dealer in objects of art. He is the owner of a farm situate about a mile and a quarter south-east of Claremount, and visits there from time to time.

The appellant and the respondent first met one another in the respondent's store in June 1942, and the appellant became a customer. In October of that year the appellant invited the respondent and his wife to dinner at his farm. The invitation was accepted, and after that time there were numerous occasions when the respondent and his wife were at the appellant's place. There was much evidence adduced as to the conduct of all parties concerned, and numerous incidents are described in detail. I do not deem it necessary or advisable to discuss the evidence relating to any facts in dispute.

On or about 24th May 1943 the respondent's wife ceased to occupy the same room and bed with him and thereafter occupied a separate bedroom in the same house. On the evening of 29th May she went to the appellant's farm and was there without her husband when the appellant arrived at about 12.30 a.m. on 30th May. They both remained in the house that night, and it has been found by the jury that adultery was committed by them at that place and on that date.

This action was commenced on the 20th July 1943, and was first tried at the town of Whitby in October 1943, when a verdict for the respondent was found and judgment was given accordingly for the sum of \$10,000. On 16th March 1944 the Court of Appeal directed that a new trial be had: [1944] O.W.N. 222, [1944] 2 D.L.R. 284. After this second trial, on the 26th, 27th and 28th days of February, and the 1st, 2nd, 5th, 6th, 7th and 8th days of March, 1945, judgment was given upon findings of the jury in favour of the respondent for \$10,000, the same amount as found by the jury after the first trial.

It is of interest to mention the history and nature of such an action as this.

An action for damages founded on an act of adultery has its origin in the common law of England. The usual form of the action was trespass *vi et armis*, but an action on the case was equally good: *Coke (Cooke) v. Sayer* (1759), 2 Wils. 85, 95 E.R. 700, more fully set out in *Macfadzen v. Olivant* (1805), 6 East 387 at 388-9, 102 E.R. 1335; *Butterworth v. Butterworth and Englefield*, [1920] P. 126 at 131-2. It was known as an action for criminal conversation, or, as abbreviated, "crim. con.", the description being derived no doubt from the word "conversation" meaning in one sense "sexual intercourse or intimacy" (see

Murray's New English Dictionary), and from the manner in which the act of adultery was regarded in ancient times. It was not only a sin against the laws of God but was a crime severely punished under the laws of King Edmund, the laws of Canute and those of Henry I. The Julian law, among the old Romans, made it punishable by death: Tomlin's Law Dictionary, 1835, vol. 1, s.v. "adultery". In the year 1604 a bill was brought into Parliament "For the better Repressing the detestable Crime of Adultery", but it was dropped because it "rather concerned some particular persons than the public good": Selwyn's Nisi Prius, 13th ed. 1869, vol. 1, p. 7, note (b). In 1650, during the time of the Commonwealth, adultery was made a capital crime: 7 C. & P. (1835) p. 200, note (a). But at the Restoration this Act, as well as all other statutes passed in the preceding years, became of no authority: 12 Car. II, 1660, c. 12, s. 12. It is of historical interest also to mention that in 1800 an attempt was made to bring the offence within criminal jurisdiction, but a bill then passed by the Lords was negatived in the Commons: Parl. Hist. vol. 35, pp. 225-325, referred to in Selwyn, *loc. cit.* Under a statute of the Province of New Brunswick, 31 Geo. III, 1791, c. 5, s. VIII, "Incest, Adultery, Fornication and all acts of lewdness, and unlawful cohabitation, and intercourse between man and woman" were made crimes punishable by fine and imprisonment, or either of them. But in the Province of Ontario the offence of adultery is a civil injury only, giving to a husband a right to recover compensation in damages against the adulterer.

The right to maintain an action in England for criminal conversation was abolished by s. 59 of The Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85. That section reads in part: "... no action shall be maintainable in England for criminal conversation." Obviously that enactment applies only to the right to maintain such an action in England, and does not apply to the right to do so in Ontario. But be that as it may, it is my opinion that s. 59 of The Matrimonial Causes Act, *supra*, did not become part of the law of this Province. The Divorce Act (Ontario), 1930 (Dom.), c. 14, introduced "The law of England as to the dissolution of marriage, and as to the annulment of marriage, as that law existed on the fifteenth day of July, 1870, in so far as it can be made to apply in the Province of Ontario", and subject to certain provisions respecting repeal, alterations, varia-

tion and modification. This statute was confirmed by The Marriage Act, 1933 (Ont.), c. 29, s. 2, now R.S.O. 1937, c. 207, s. 35. But there are many provisions (including s. 59) of The Matrimonial Causes Act, 1857, which are not part of the law of England "as to the dissolution of marriage" or "as to the annulment of marriage", and because such provisions do not fall within the scope of The Divorce Act (Ontario), 1930, *supra*, they were not introduced by that statute into the law of this Province. Moreover, the right to maintain an action for damages caused by an adulterer is, in my opinion, a civil right within the jurisdiction of the Provincial Legislature and is not a matter of marriage and divorce within the jurisdiction of the Dominion: *Mitchell v. Mitchell and Croome*, 44 Man. R. 23, [1936] 1 W.W.R. 553, [1936] 2 D.L.R. 374 at 376. Thus in respect of such rights in this Province resort must be had to the laws of England as they stood the 15th day of October 1792: The Property and Civil Rights Act, R.S.O. 1937, c. 145.

It is then argued that the respondent cannot maintain this action because *volenti non fit injuria*. Lord Kenyon upon two occasions ruled that if the husband "openly violated all those rules of conduct which decency required, and affection exacted of him; if he openly practised his gallantries without regard to his wife and violated the marriage-bed, so as to create disgust or unhappiness in his wife; that such a husband could not come into a court of justice for damages, or complain of the loss of the society of a wife which he never courted or enjoyed; and that, of course, such conduct on the part of the husband went to the ground of the action." *Sturt v. The Marquis of Blanford* (1801), cited in *Wyndham v. Lord Wycombe* (1801), 4 Esp. 16 at 17, 170 E.R. 626. This view was expressed notwithstanding the law as laid down by Mr. Justice Buller in *Duberley v. Gunning* (1792), 4 Term Rep. 651 at 657, 100 E.R. 1226, as follows: "The law on this subject is now clearly settled to be, that if the husband consent to his wife's adultery, it goes in bar of his action; if he be only guilty of negligence, or even loose and improper conduct, not amounting to a consent, it only goes in reduction of damages." The principle stated by Lord Kenyon was overruled in *Bromley v. Wallace* (1803), 4 Esp. 237, 170 E.R. 704 and Lord Alvanley, at p. 238, after stating that he was aware that Lord Kenyon had laid down a different doctrine, held "that

the infidelity or misconduct of the husband could never be set up as a legal defence to the adultery of the wife: that alone which struck him as furnishing any defence was, where the husband was accessory to his own dishonour; he could not then complain of an injury which he had brought on himself, and had consented to." He, therefore, directed the jury to consider the evidence as going in mitigation of the damages only, and not as furnishing an answer to the action. In *Winter v. Henn* (1831), 4 C. & P. 494, 172 E.R. 796, Alderson J., at p. 498, said, "I apprehend the law to be that the plaintiff will be entitled to recover, unless he has, in some degree, been a party to his own dishonour, either by giving a general licence to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with this defendant, or by having totally and permanently given up all the advantage to be derived from her society. If you should be of opinion that the plaintiff has done any of these three things, then the defendant will be entitled to your verdict." Counsel for the appellant relied on the judgment in *Pearl v. Pearl and Lees*, [1943] O.R. 720, [1943] 4 D.L.R. 387, in support of his argument. But that judgment depended upon the particular facts appearing in the evidence. It was made plain that there was passive acquiescence on the part of the plaintiff amounting to consent to the very act of adultery upon which he relied to establish his case. The injury was *volenti*; the plaintiff was in fact an accessory to the offence of which he complained. I assume that the submission now made to this Court was made by counsel for the appellant to the jury at trial, namely, that the plaintiff was himself a privy to the adultery of his wife. I conclude from the verdict that the jury were not willing to make such a finding, but I do not overlook the fact that no question was expressly directed to that issue. It may be, but it is for a judge at trial to say, that such a question might well be left to a jury for answer by them.

It is argued that the verdict of the jury is perverse. Counsel urges that the jury did not fairly and properly consider certain evidence and that if they had done so in a judicial manner a verdict in favour of the respondent could not have been found. In particular, the attention of the Court is directed to evidence touching the character of the respondent; misconduct and negligence on his part; the proceedings instituted for divorce in which

he was named as a co-respondent; the presence in both the respondent and his wife of symptoms of venereal disease; and evidence relating to the submission that the respondent, by himself or with his wife, formed a scheme or plot to involve the appellant in wrongdoing. Finally it is argued that the jury ought not to have made a finding of adultery based on evidence of two witnesses of whom it was said that they had a motive to injure the appellant. It is well to record at once the unanimous opinion of the members of the Court, expressed during the hearing, that there was evidence upon which a jury might properly make a finding that adultery was committed at the time and place stated in the verdict. The principle on which the Court will act in setting aside the verdict of a jury as against the weight of evidence is discussed in *McCannell v. McLean*, [1937] S.C.R. 341 at pp. 343 *et seq.*, [1937] 2 D.L.R. 639. The verdict will not be set aside on that ground unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury, reviewing the evidence as a whole and acting judicially, could have reached it. That condition has not been shown to exist on the evidence submitted to the jury in this case in respect of the issue whether adultery was committed, and in consequence this Court will not interfere with the finding as made. On the contrary, that issue of fact is determined and should not be retried. In respect of the other matters referred to by counsel as not having received proper consideration by the jury, I shall now refer to only one of them. If the defendant establish by evidence that the respondent, in pursuance of a scheme or plot, alone or in concert with another person or other persons, contrived to bring about the injury for which he now seeks compensation, the respondent's action must fail. He cannot recover damages grounded on his own turpitude. Again, I assume that this submission was made to the jury upon the evidence adduced at trial, and that it was not favourably received there. But again, no question was put to the jury expressly to determine that issue between the parties. It is proper to point out that counsel did not ask that such a question be submitted for consideration of the jury, nor any other than the ones asked, but nevertheless contended in this Court that a finding of fact in favour of the appellant ought to be made. I think this Court ought not in the circumstances to make such a finding now, but if upon other grounds a new trial ought to be had between the

parties, and the presiding judge then deems it proper upon the evidence to do so, an appropriate question may be left to another jury to determine the issue.

The matters of misdirection and non-direction in the charge of the learned trial judge, of which the appellant complains, need not be discussed at length. It is sufficient to say that there is no error of such a character or extent as would alone entitle the appellant to a new trial. It was not strictly accurate to tell the jury that whatever the respondent's intentions were, "whether he had a scheme of that kind or not, such a scheme could have nothing whatever to do with the fact that these two people, Mrs. Mowder and Roy, were together in the house on the night of the 29th and 30th May, 1943." That was a matter for consideration of the jury upon the evidence adduced. Likewise, there is some strength in the objection to the statement referring to the appellant that "If his intentions were the worst, there is not a suggestion in the evidence that he had anything to do with these people being together on this night, unless you found that he and Flowers were working together." It was not wholly satisfactory under the particular circumstances to restrict the jury in their deliberation on the question relating to the alleged scheme to entrap the appellant.

During the trial the learned judge admitted evidence that adultery was committed on 30th May 1943. The statement of claim does not contain an allegation that the defendant committed adultery on that particular date, although other dates are expressly set forth in the pleading. I think that the date of such an alleged offence should be contained in the statement of claim when it is known to the plaintiff, as it was in this case, before the second trial. But under the particular circumstances there was admittedly no surprise at trial to counsel for the appellant. Therefore, effect cannot now be given to the objection.

The learned judge permitted counsel for the plaintiff to question Mrs. Mowder upon the state of the business conducted by the respondent after she ceased to take part in its operation. Objection to the admission of that evidence was made at trial by counsel for the appellant, and in my opinion the objection was well taken. It has been held that the loss of a wife's assistance in her husband's business is a proper element of damages: *Keyse v. Keyse & Maxwell* (1886), 11 P.D. 100. But a distinction is to be made between a case in which damage is done to the husband's business by rea-

son of his losing his wife's assistance therein, and a case in which loss is caused by the disruption or dissolution of a business partnership of the husband and wife. The plaintiff did not plead special damages by reason of interference with the partnership business, and evidence thereof ought not to have been received: see *Butt v. City of Oshawa*; *Wilkinson v. City of Oshawa*, 59 O.L.R. 520, [1926] 4 D.L.R. 1138, referred to in *Graham v. Saville*, [1945] O.R. 301, [1945] 2 D.L.R. 489. Moreover, the learned judge in his charge told the jury: "You may consider that he [the respondent] has lost her services in the store, which were undoubtedly of value, and he has had to replace her by some one else." He proceeded to discuss the matter of partnership and then stated, "Those are all matters that you have to take into consideration in arriving at the money value of this woman to her husband in this case." Thus the admission of this evidence, relating, as it does, in my opinion, to the value of Mrs. Mowder to her husband as a business partner and not as a wife, and to the special damage sustained by reason of the respondent being deprived of her services as a partner in the business, is of such substance that it may well have influenced the jury in their assessment of damage. It consequently is one ground upon which, in my view, the trial of the action was unfair and prejudicial to the appellant. There was also rejection of certain evidence which was admissible and bears directly on one of the main grounds of defence. In cross-examination of Mrs. Mowder counsel for the appellant directed the attention of the witness to the following statement made in a letter from the respondent to her: "... it very nice for Mrs. Roy to give you a good time and very bold off you to accept Mrs. Roy's kindness with what in the back of our mind's". She was asked, "What was 'in the back of our minds'?" The question was not permitted and no answer was given, but it is my opinion that it was relevant and admissible evidence touching the issue of whether there was a scheme or plot to which the respondent or his wife or both were privy. The rejection of this evidence, though possibly not sufficient ground in itself to support an order for a new trial, adds to the reasons for my view that the trial was not satisfactory.

During the course of the trial it appeared that a newspaper published at Whitby disclosed the verdict found after the first trial, and also made an incorrect statement. It was not shown

that a copy of the newspaper was seen or read by any member of the jury. An application on behalf of the appellant was made to the presiding judge to adjourn the trial on the ground of prejudice. The learned judge refused to do so, and I think he was right.

Finally, the appellant contends that the amount of damages awarded to the respondent is excessive. It is desirable and perhaps helpful on this branch of the appeal to keep clearly in mind the principles so fully discussed and stated in *Butterworth v. Butterworth and Englefield, supra*. (See also *Ewer v. Ewer and Charlton* (1920), 36 T.L.R. 517). I extract certain of them as follows:

1. Damages are compensatory only, and exemplary or punitive damages are not permissible. I add the following observation made by the learned judge (at p. 157): "The temptation is sometimes strong to make them punitive. They may easily become excessive. I conceive that moderation rather than undue severity should be the principle."

2. The two main considerations upon which damages are to be based are these: "first, the actual value of the wife to the husband; secondly, the proper compensation to the husband for the injury to his feelings, the blow to his marital honour and the serious hurt to his matrimonial and family life."

3. The value of the wife has two aspects, namely, the pecuniary aspect and the *consortium* aspect.

4. The whole character and conduct of both the wife and the husband is in issue.

5. The ease or difficulty with which the defendant gained his desire, and his conduct in general, may be a most direct aid in the ascertainment of the value of the wife upon the *consortium* aspect. Likewise the blow to the husband, and the shock to his feelings, depend to a large extent on the conduct of the defendant, including such features, if present, as treachery, grossness of betrayal, wantonness of insult and like circumstances.

The quantum of damages ought to be proportioned to the degree of the injury: Selwyn, *op. cit.*, vol. 1, p. 26. The amount which ought to be awarded is "the value of that particular wife to that particular husband in all the circumstances of that specific case": Lush on Husband and Wife, 4th ed. 1933, p. 41, referring to Rayden on Divorce, 3rd ed., 1932, pp. 306 *et seq.*

All circumstances relevant to the value of that certain wife to her husband in either the pecuniary or the *consortium* aspect, or to the injury to his feelings and the like, are admissible in evidence. Thus in support of the claim it may be shown that the wife furnished assistance in the husband's business (if it was his): *Keyse v. Keyse & Maxwell*, *supra*, her capacity as a housekeeper and her ability generally in the house: *Butterworth v. Butterworth and Englefield*, *supra*, at p. 142, and Sedgwick on Damages, 9th ed. 1913, vol. II, s. 478, therein referred to; "the wife's purity, moral character and affection, and her general qualities as a wife and mother": *Butterworth v. Butterworth and Englefield*, at p. 142: the defendant's conduct; and the extent of the shock to the plaintiff's feelings and the blow to his marital honour. Likewise in mitigation of damages it is permissible to show in evidence that this wife had little or no value to her husband and that there was little or no shock to his feelings or blow to his marital honour under the particular circumstances. It might be shown, for instance, that at the time of the act of adultery the wife did not furnish any assistance to her husband, either in his own business or in his home; "that the petitioner was a careless husband and did not adequately protect his wife": Arnold on Damages and Compensation, 2nd ed., 1919, p. 227; see also Lush, *op. cit.*, p. 46; "that the husband's own negligence or harshness of language or cruelty may have destroyed the affection of his wife or sapped her matrimonial fidelity": *per* McCardie J. in *Butterworth v. Butterworth and Englefield*, *supra*, at p. 145: "that the petitioner's wife had lived an immoral life prior to the adultery alleged against the defendant"; Arnold, *op. cit.*, p. 228; see also Selwyn, *op. cit.*, p. 27. It may also be shown in reduction of the quantum of damages that the wife was infected with venereal disease prior to the act of adultery alleged; that likewise the husband was infected; that he was a named co-respondent in an action for divorce brought by another man against his wife; and that the plaintiff's wife ceased to occupy the same room and bed thereafter and prior to the adultery with the defendant. I have not attempted to exhaust the circumstances which may be shown in evidence and which a jury may properly consider in fixing the amount of damages, if any, sustained by a plaintiff by reason of an act of adultery on the part of his wife. The jury ought to be guided by consideration of all relevant circumstances, and may

thereafter, in accordance with the principles discussed, fix a reasonable sum as compensation to the plaintiff. It may be pointed out, however, that the jury may, in their discretion, if the circumstances warrant them in so doing, find that the plaintiff has suffered no damage at all, even though adultery is proved: *Butterworth v. Butterworth and Englefield*, *supra*, at p. 134.

It remains to discuss briefly the claim made in this action for damages alleged to have been sustained by the respondent by reason of the alienation of his wife's affections. It has been said that an action on such a ground is unknown to the law of England: Lush, *op. cit.*, p. 35. That learned author, at pp. 35-6, ventures the view that "It would seem that the English temperament is sufficiently sagacious to make the importation into the English law of the alienation of affection as a ground of action so remote as to be a negligible danger." But, nevertheless, it would appear to be settled law in this Province that such an action may be maintained. In *Bannister v. Thompson* (1913), 29 O.L.R. 562, 15 D.L.R. 733, (varied (1914), 32 O.L.R. 34, 20 D.L.R. 512), Middleton J., relying on the authority of *Winsmore v. Greenbank* (1745), Willes 577, 125 E.R. 1330, said, at p. 565: "... that the law recognises the right of the husband to recover damages against a defendant for any misconduct which deprives the plaintiff of the love, services, and society of his wife . . . commonly called *consortium*." The distinction between such an action and an action of crim. con. is pointed out. The learned judge stated, at p. 566: "To maintain the latter, proof of adultery is essential and the action may be maintained even though there has been no consequent loss of the wife's affections, society, and services." The quantum of damages recoverable in an action for alienation of affections of a wife is obviously proportionate to the value of them in the particular case under consideration. It is for the jury to measure the extent of the loss, if any, caused by the defendant's misconduct. It may be assumed that at the time of marriage the plaintiff possessed the affection of his wife. But it is open to the defendant to show in evidence that before or at the time he first became acquainted with her the plaintiff did not in fact possess the *consortium* of his wife in whole or in part; that the loss, wholly or partly, was occasioned by his own behaviour, or by her own determination, or by both contributing causes.

Thus, as in an action for crim. con., the conduct of the parties is in issue. In support of the claim the plaintiff may show in evidence all circumstances relevant to measure the extent of the *consortium* enjoyed by him at the time his wife and the defendant first met. And the defendant may likewise, in reduction or denial of any damage, show that the loss complained of did not arise through his misconduct. For instance, he may attempt to satisfy the jury that the plaintiff lost his wife's affections and love, in whole or in part, by his own carelessness, negligence, or ill treatment; that she became infected with venereal disease from him; that he misconducted himself with another woman or women; that she voluntarily terminated her cohabitation, services and society with him for reasons which did not in any way concern the defendant; and finally, counsel may urge the jury to believe her testimony that she was completely unhappy with her husband long before she met the defendant. The whole question is for the jury to decide on the evidence adduced, and I again carefully refrain from an expression of opinion on the particular facts in the case. If the jury find that the plaintiff suffered a loss of *consortium* by reason of the acts of the defendant, it may award an appropriate amount of compensation as damages. But it has been held (as in an action for crim. con.) that punitive damages cannot be awarded in an action for alienation of affections: *Marangos v. Harold*, 52 O.L.R. 395, [1923] 4 D.L.R. 520. Conversely, if there has been no loss sustained by the plaintiff by reason of the defendant's acts the jury is not entitled to award any damages.

Applying to this action the principles I have discussed, and after careful study of the evidence adduced at the second trial, I am satisfied that the jury in making an award of \$4,000 for adultery and \$6,000 for alienation of affections must have acted under the influence of undue motives, or some gross error or misconception: *Chambers v. Caulfield* (1805), 6 East 244, 102 E.R. 1280. I think the amounts awarded by the jury are so excessive that no twelve men could reasonably have given them. Therefore in the exercise of my discretion I would direct that the judgment in the court below be set aside and that a new trial be had between the parties, excepting only from such new trial the issue of fact previously stated.

This action has been tried on two occasions at the assizes held in the town of Whitby, and in my opinion the place of trial should

now be changed. It would be not inconvenient if the new trial were held at the city of Toronto, and I would so direct. That there is precedent for such an order appears in *Alexander v. Canadian National Railway Co.*, 65 O.L.R. 162 at 167, [1930] 3 D.L.R. 140, 36 C.R.C. 404.

The costs of the former trials and of the new trial ought to be in the discretion of the judge presiding at the new trial. There has been divided success on this appeal and it would be fair in the circumstances to direct that there be no costs of the appeal allowed to either party.

ROACH J.A. agrees with LAIDLAW J.A.

New trial ordered.

Solicitor for the plaintiff, respondent: A. W. S. Greer, Oshawa.

Solicitors for the defendant, appellant: Slaght, Ferguson & Carrick, Toronto.

[COURT OF APPEAL.]

Rex v. Barnes.

Criminal Law—Dangerous Driving—Speed—Look-out—Special Circumstances—Sentence—The Criminal Code, R.S.C. 1927, c. 36, s. 285(6), as enacted by 1938, c. 44, s. 16.

A conviction for dangerous driving, in circumstances fully set out in the reasons for judgment, was affirmed (McRUER J.A. *dubitante*), but the sentence was reduced from one of four months' imprisonment to a fine of \$200, or, in default of payment, two months' imprisonment.

Per ROBERTSON C.J.O.: It is not the law that a motorist, in an urban district, is entitled to drive at any speed up to 30 miles per hour; often it would be reckless and dangerous, and therefore a criminal offence, to drive at such a speed. Further, it is the duty of the driver of a motor car at all times to keep such a look-out as will enable him to see the roadway ahead of him within the range of the headlights that he is required by law to carry, and this vigilance becomes the more necessary in places where it is difficult to see well.

Per ROACH J.A.: Dangerous driving within the meaning of s. 285(6) may result from conduct which is either positive or negative, or both. Speed which is excessive in the circumstances would be positive, while lack of attention amounting to criminal inattention would be negative. Either may exist without the other, or they may exist in combination and be so correlated that one is measured by reference to the other. In the present case, the accused's speed was excessive when taken in relation to his lack of attention, and, conversely, his attentiveness was insufficient having regard to his speed. It was the combination of the two that made his driving dangerous; the time and the place and the other surrounding circumstances called for either more attention or less speed.

AN APPEAL by the accused against his conviction and sentence on a charge of dangerous driving, under s. 285(6) of The Criminal Code, R.S.C. 1927, c. 36, as enacted by 1938, c. 44, s. 16.

17th December 1945. The appeal was heard by ROBERTSON C.J.O. and ROACH and MCRUER JJ.A.

Joseph Sedgwick, K.C., for the accused, appellant: The deceased, Silcox, by standing in a dark spot, with his lights off, and dressed in dark clothes, had placed himself in a position of great danger. There is no evidence whatever that the accused drove recklessly or negligently. His speed was not excessive, and there was no reason for him to expect to find a motorcyclist repairing his motorcycle in a dark spot behind a brilliantly lighted sign. The glare from this sign was sufficient to dull the vision of the most observant motorist, and the other persons who gave evidence had all had difficulty in seeing Silcox.

Even if there was negligence, it was not of such a degree as to be criminal: *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576, 26 Cr. App. R. 34, [1937] 2 All E.R. 552.

The real cause of the accident was the negligence of the deceased in parking on the highway: *Speers et al. v. Griffin et al.*, [1939] O.R. 552, [1939] 3 D.L.R. 412, and without lights: *Maxwell v. Callbeck*, [1939] S.C.R. 440, [1939] 3 D.L.R. 580; *McLean v. McCannell*, [1938] O.R. 37, affirmed, *sub nom. McCannell v. McLean*, [1937] S.C.R. 341, [1937] 2 D.L.R. 639.

The sentence was excessive in the circumstances. This is the first offence of a responsible member of the community. He was not driving at an excessive speed, nor was he under the influence of liquor, and at the most he was guilty of a momentary lapse. These circumstances do not warrant the imposition of a term of imprisonment. The maximum, had the charge been tried under Part XV, would have been three months' imprisonment. *Rex v. Carr*, [1937] O.R. 600, 68 C.C.C. 343, [1937] 3 D.L.R. 537, relied on by the magistrate, was a conviction for criminal negligence, not for dangerous driving, and was distinguished in *Rex v. Bower*, [1941] O.R. 51, 75 C.C.C. 323, [1941] 2 D.L.R. 269.

W. B. Common, K.C., for the Attorney-General, respondent: The appeal is from a finding of fact. The negligence of the accused lay in a failure to keep a proper look-out, and in driving too fast in the circumstances. The fact that he drove on after the impact, not knowing that he had hit a man, and the distance of 89 feet through which the motorcycle was thrown, are evidence of this.

The accused admitted that he knew this part of Eglinton Avenue well, and knew that it was poorly lighted, having a dark spot behind the brightly-lighted sign, but nevertheless he did not slacken his speed. It is not the law that he was entitled to expect that there would not be a motorcyclist on the highway; a driver is not entitled to presume anything. The real issue was whether, if the accused had been keeping a proper look-out, he would have seen Silcox in time to avoid the accident. The magistrate has found against the accused on this issue, and his finding should not be disturbed.

Contributory negligence is no defence to a criminal charge.

Joseph Sedgwick, K.C., in reply.

Cur. adv. vult.

4th February 1946. ROBERTSON C.J.O.:—This is an appeal from the conviction of the appellant by Magistrate Bigelow, at Toronto, on 30th October 1945, on a charge under s. 285(6) of The Criminal Code, R.S.C. 1927, c. 36, as enacted by 1938, c. 44, s. 16. The appellant also appeals from his sentence of four months' imprisonment and an order prohibiting him from driving a motor vehicle within Canada for two years.

On the evening of 24th September 1945, the appellant, at about 9 o'clock, was driving westerly on Eglinton Avenue East. He approached Bayview Avenue at a speed which he himself puts at about 30 miles per hour, and which at least one witness puts considerably higher. He crossed Bayview Avenue and proceeded westerly without diminishing his speed. At a point about 75 feet west of Bayview Avenue he struck a man who was engaged in making some adjustment or repairs to his motorcycle on the highway, some 2 feet south of the north curb. The man was killed. The appellant did not see either the man or the motorcycle before he collided with them, and did not know that he had had a collision until his wife, who was riding with him, informed him that she thought he had hit some one.

Much was made for the appellant of the presence on the north-west corner of the intersection of Eglinton Avenue with Bayview Avenue of a large and well-lighted advertising sign, which faced towards the south-east corner of the intersection. It was said, and it was not disputed, that this sign, when lighted, as it was on the occasion in question, makes it difficult for one approaching the intersection from the east to see clearly the

highway to the west of the sign. It is further pointed out that there are no street lights on the north side of Eglinton Avenue. On the other hand, other persons did in fact see the motorcycle and its rider as he was stopped on the highway. One witness, approaching in a motor car from the west, saw something on the highway, which he could not clearly identify, at a distance of about 35 yards. Another witness, waiting in his motor car on Bayview Avenue, just south of the intersection, for the appellant to pass, also saw the motorcycle and its rider. The wife of the appellant, as already stated, also saw the man on the highway ahead of them, but only at the very instant of collision.

No doubt, there are difficulties about visibility at this place, but the appellant, in his evidence, admits that he was familiar with the location. He says that he drove along there quite often. He further says, "I never trusted it along there; it is pretty dark along there; I never felt quite at home as on Danforth Avenue or Bloor Street." Asked, however, if he drove with a little extra care, he said "No."

I do not see how we can interfere with the finding of the magistrate upon the evidence, in these circumstances. If this had been a civil action for damages for negligence arising out of the death of the driver of the motorcycle, much could be said in support of the contention that the chief cause of the collision was the negligence of the rider of the motorcycle. No doubt, the appellant is entitled to have the circumstance considered in this case that the presence of some one repairing a motorcycle on the roadway was not something to be expected. The magistrate, however, has found that the appellant should have seen the motorcycle and its driver, and that he was driving too fast, under all the circumstances, and was not keeping a proper look-out. I do not think we can interfere with that finding. The appellant, notwithstanding his knowledge of the difficulty in distinguishing objects on the roadway at the place of this accident, did not regulate his speed accordingly, nor did he keep such a look-out as would enable him to see what was ahead of him, in time to avoid striking it. It is not the law that within an urban district the driver of a motor car is entitled to drive at any speed up to 30 miles per hour. Often it would be reckless and dangerous to do so, and therefore a criminal offence. It is also the duty of the driver of a motor car at all times to keep

such a look-out as will enable him to see the roadway ahead of him within the range of the headlights that he is, by law, required to carry. His vigilance becomes the more necessary in places where it is difficult to see well, as in the place of this accident. Unless due regard is paid by motorists to these fundamental rules of driving, accidents will happen, and there will be such prosecutions as this.

The appeal from conviction must, therefore, be dismissed, but something is to be said as to the appeal from sentence.

The appellant's record, both as a driver of a motor car and in other respects, appears to be clean. His conduct has always been that of a well-conducted and highly respected citizen. The fact that his driving resulted in the death of another was not wholly attributable to his negligence. The failure of the motorcyclist to keep a look-out, or at least to show a warning light while repairing his machine on the roadway, substantially contributed to the accident that occurred. These are matters, that, in my opinion, are proper to be considered in connection with the sentence to be imposed. In many cases of dangerous driving nothing short of a term of imprisonment is appropriate to the offence, and if it were not for the somewhat exceptional circumstances of this case I should not be inclined to interfere with the sentence imposed by the magistrate. After careful consideration, however, it is my opinion that the interests of justice will be served in this case by substituting for the term of four months' imprisonment imposed by the magistrate a fine of \$200. In default of payment of the fine a term of two months' imprisonment should be imposed. The magistrate's order prohibiting the appellant from driving a motor vehicle in Canada for two years should stand.

ROACH J.A.:—The appellant was convicted by Magistrate Bigelow, at the city of Toronto, on the 30th day of October 1945, on the charge that on the 24th day of September 1945, at the city of Toronto, he "did drive a motor vehicle on a street, road, highway or other public place in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the said street, road, highway or place and the amount of traffic which was actually at the time or which might reasonably be expected to be on the said street, road, highway, or place," contrary to The Crim-

inal Code, s. 285(6). Following his conviction he was sentenced to a term of four months, and the magistrate made an order prohibiting him from driving a motor vehicle anywhere in Canada for two years. From that conviction he now appeals, and as against the sentence he applies for leave to appeal.

At about nine o'clock on the night of 24th September the appellant and his wife were driving in a motor car westerly on Eglinton Avenue. They had crossed the intersection of Eglinton and Bayview Avenues, and a short distance west of that intersection his motor car struck a motorcycle and its rider, one Silcox. The motorcycle, at the time, was stationary, and Silcox was making some adjustment to the engine. Silcox died as a result of the injuries thus received.

The area within the intersection is not a rectangle. The northerly limit of Eglinton Avenue, west of Bayview Avenue, is a few feet south of the line of the northerly limit east of Bayview Avenue. Motorists coming from the east, and intending to continue along Eglinton Avenue past the intersection, turn on a slight arc southerly within the intersection and then straighten out at the westerly limit thereof. Eglinton Avenue is paved throughout, and the width of the pavement west of Bayview Avenue is 36 feet. Bayview Avenue south of Eglinton Avenue is paved to a width of 42 feet, but as it continues north of Eglinton Avenue it is only a dirt road, and the travelled portion north of Eglinton Avenue is narrower than the paved portion south of Eglinton Avenue, thus forming a sort of bottle-neck.

Standing on the lot at the north-west corner of the intersection was a large and brightly illuminated sign-board. It was constructed at an angle across the corner of the lot and faced south-easterly. The southerly end of that sign-board was about 12 to 15 feet north of the northerly curb of Eglinton Avenue and about 5 feet west of the west curb of Bayview Avenue. There were street lights on the south side of Eglinton Avenue west of Bayview Avenue, but none on the north side close enough to give any illumination to the place where the collision occurred. Both streets in this neighbourhood are residential, but the land on the north side of Eglinton Avenue for several hundred feet west of Bayview Avenue was vacant. In this vacant area, and a short distance west of the sign-board, there were some tall

trees with branches heavy in foliage extending almost to the north curb. Near the base of those trees was a growth of shrubbery, and the area from the shrubbery to the curb was overgrown with tall grass and weeds.

The evidence establishes that the motorcycle was standing about two feet out from the north curb, opposite the trees, and about 75 feet west of the west curb of Bayview Avenue. It was facing in a westerly direction, without lights. That immediate area was a dark spot in the landscape. The deceased was either crouched over or in a stooped position close to the motorcycle, and he was dressed in drab clothing which blended with the surroundings, including the pavement. In sharp contrast to this area of darkness and shadows was the area within the intersection and the fringe of territory adjoining it, which was well illuminated by the reflection of the light from the sign-board. Having passed through that highly-lighted area, the appellant proceeded through the dark area a distance of less than 75 feet before he struck the motorcycle and the deceased. The night was dark, with rain threatening. The deceased and a companion, who also had a motorcycle which he had left parked on the south side of Eglinton Avenue, had earlier been attempting to make some necessary adjustments to the engine. It was so dark that they had to light matches to see what they were doing. A few moments before the collision occurred, the companion had crossed over to the south side of Eglinton Avenue with the intention of bringing his motorcycle over close to the one belonging to the deceased, and turning his headlight on it.

The appellant stated in evidence that he was driving "in the neighbourhood of thirty miles an hour"; that as he approached the intersection from the east he observed a motor car stopped at the south side of the intersection "waiting to turn out"; that he (the appellant) concluded that the driver of that car intended him to proceed, and he did proceed, and just after he got through the intersection he "felt a sudden jar of the car" and "didn't realize what had happened" and "suspected a hole in the road". He said he recalled two or three cars approaching from the west before the impact, but they did not affect his driving, nor did the glare from the illuminated sign-board interfere with his driving.

The magistrate in giving judgment said, in part:

"I am forced, therefore, to the irresistible conclusion that the accused should have seen Silcox and his motorcycle and that he was driving too fast, under all the circumstances; that he was not keeping a proper look-out, and would have seen Silcox in abundant time to avoid the deceased, if he had, and that, therefore, his degree of negligence is sufficiently great to bring it well within the charge of dangerous driving laid against the accused."

In my opinion the magistrate was right in his conclusion.

Dangerous driving within the meaning of s. 285(6) may be the result of conduct on the part of the driver either positive or negative or both. Excessive speed under the circumstances would be positive conduct; lack of attention amounting to criminal inattention would be negative conduct. One may exist without the other, or they may exist in combination and be so correlated that one is measured by reference to the other. Having regard to the nature of the intersection and the amount of traffic which at the time was in the neighbourhood thereof, and the fact that the area within the intersection was brightly lighted with some glare coming from the sign-board, while to the immediate west thereof was the dark area to which I have referred, the appellant's speed, in my opinion, was excessive when taken in relation to his lack of attention, and, conversely, the degree of his attentiveness was too meagre having regard to his speed. It was the combination of the two that made his driving dangerous. The time and the place and the other surrounding circumstances called for either more attention or less speed. Eglinton Avenue is an important thoroughfare for east- and west-bound motor traffic. That part of Bayview Avenue which is paved is an important thoroughfare for north- and south-bound traffic.

What is the evidence as to speed? One Dr. Anderson was the first motorist approaching the appellant from the west. He gave evidence and thought the appellant "was not going excessively fast". He estimated the appellant's speed at between 20 and 30 miles per hour. The difficulty for one of two motorists approaching one another at night to estimate the speed of the other is very great. Our individual experiences have taught us that.

As against that evidence, there is the evidence of a pedestrian who was standing on the south-west corner of the intersection and first saw the appellant's car as it was going across the intersection. He estimated its speed at 35 miles per hour and "maybe faster". There is also the evidence of the motorist who was stopped at the south limit of the intersection. He observed the appellant's car as it came down the slight incline from the east toward the intersection. He said,—It "came down at quite a good speed and as it was passing I got the impression that it was quite a fair—I would not care to estimate how fast it was going—quite a fair clip" Those two witnesses were in a much better position to give evidence as to speed than was Dr. Anderson.

There was no slackening of speed as the appellant either approached or went through or continued past the intersection, until after he had struck the motorcycle and Silcox.

It will be manifest from what I earlier stated concerning the location where Silcox and his motorcycle were that they would be obscured at least until the headlights of the appellant's car would shine upon them. There would come a time when the appellant's car, having traversed the slight arc in the intersection, would be pointing straight west along Eglinton Avenue. That time came when his car was about 75 feet from the point of impact, but the appellant did not see the objects in his path. The licence plate at the rear of the motorcycle was equipped with four green reflectors and a red one, but it is possible that Silcox was in such a position that his body prevented the appellant's headlights shining on those reflectors. I would not be doing the appellant justice unless I took into consideration the fact that the motorcycle and Silcox's clothing were drab in colour and tended to blend with the surroundings, and that, according to the evidence of Dr. Anderson, Silcox remained motionless from the time that the appellant's car was in the intersection. The appellant's wife, who was seated beside him, did see Silcox, but not until the car was almost upon him. The appellant did not see either Silcox or the motorcycle, even when his car struck them. The photograph of the appellant's car shows that it was the right front of his car which struck the motorcycle and Silcox. The right front fender below the headlight is badly collapsed, throwing the right headlight con-

siderably out of alignment, the grille to the right of the centre and on a line with the headlights is also badly collapsed. It is obvious that the force of the impact was very substantial. It is impossible, in my opinion, not to conclude that at the moment of the impact Silcox's body or the motorcycle, or both, would be immediately in front of the right headlight and interrupt the beam of light therefrom. The beams from the two headlights converge some distance ahead of the car and I am impressed with the thought that had the appellant been paying attention he, at least at the moment of the impact, would have realized that he had struck those objects, but his degree of inattention was so great that, as he put it, he thought he had struck a hole in the road and did not know otherwise until his wife informed him. Dr. Anderson had seen the motorcycle and Silcox silhouetted against the approaching lights of the appellant's car, but the motorcycle and Silcox were so obscure that Dr. Anderson thought it was a pile of brush and referred to it in his evidence as "the mass". He saw the appellant's car hit "the mass" and "the mass" being carried on the front of the appellant's car some distance westerly. To my mind it is inconceivable that if the appellant was keeping even a reasonable lookout he would not have realized that he had struck some movable object, rather than that his car had struck a hole in the pavement.

In my opinion there was negligence on the part of the appellant greater than that which would merely render him liable civilly in damages for the consequences, and the appellant was rightly convicted. The appeal against conviction should, therefore, be dismissed.

In sentencing the appellant to a term of four months the magistrate said, in part: "The facts in the case of *Rex v. Carr*, [1937] O.R. 600, 68 C.C.C. 343, [1937] 3 D.L.R. 537, are not greatly dissimilar to those in the case at bar, and in that case the Ontario Court of Appeal considered the sentence of four months proper."

It should be pointed out that in *Rex v. Carr* the accused had been charged with manslaughter. The jury acquitted him of that charge but found him guilty of criminal negligence under s. 284 of The Criminal Code. The essence of an offence under s. 284 is negligence causing grievous bodily harm. The essence of an offence under s. 285 (6) is dangerous driving, regardless of the

consequences. In *Rex v. Carr* this Court pointed out that "Each case has to depend on its own circumstances and this Court cannot establish a fixed sentence applicable to all cases where Parliament has not done so." Discrepancies in the punishment imposed by different tribunals for similar offences are almost inevitable. The flagrancy of the negligence which warrants a conviction under s. 285 (6) may vary from the minimum to the maximum within that section, and sentences will vary accordingly. The circumstances in different cases may vary almost infinitely. The conduct of other persons on a highway may lull a motorist into an attitude of inattention amounting to criminal inattention. Here the fact that the unfortunate deceased had parked his motorcycle in the dark area, without lights, is a factor to be taken into consideration, not only in so far as the guilt or innocence of the appellant is concerned, but also in respect of the punishment which should be imposed. The appellant is apparently a man of excellent reputation, and his public conduct heretofore is without blemish. His record as a motorist is good.

I have given the matter of sentence most anxious consideration, and I have come to the conclusion that justice would be done if, in substitution for the sentence imposed by the magistrate, a fine of \$200 were imposed upon the appellant, and the prohibition imposed by the magistrate against his driving a motor vehicle were not interfered with.

McRuer J.A.:—I agree with some hesitation that the appeal from the conviction in this case should be dismissed. The negligence of the deceased man in undertaking to repair a motorcycle on an unlighted portion of the highway, on a particularly dark night, without any warning lights, was of such a character as to make it very difficult to determine that the accused ought to be found guilty of driving his automobile in a manner dangerous to the public, when the sole fault on his part was lack of that attention that would have anticipated the unlawful act of the deceased. In addition to these circumstances, there was a car coming in the opposite direction, and, while the accused does not complain of its headlights, it would naturally to some extent attract his attention; while, on the other hand, there were no statutory lights on the motorcycle to warn the accused of the danger. My Lord the Chief Justice and my brother Roach have

come to the conclusion that the conviction should be affirmed, and from that decision I am not prepared to dissent.

I agree, however, that this is not a case for imprisonment. The degrees of negligence coming under s. 285(6) range all the way from the negligence that would found a verdict of manslaughter to the slightest margin over that negligence that would do no more than give a right to recover damages. Parliament has declared that in certain cases coming within the subsection a fine is adequate punishment. In view of the opinion I have expressed as to the quality of the offence in this case, I am in entire agreement that the appeal against sentence should be allowed and that the accused should be sentenced to pay a fine of \$200, and, in default of the payment of the fine, to a term of two months' imprisonment. The magistrate's order prohibiting the accused from driving a motor vehicle within Canada for a period of two years should not be disturbed.

Conviction affirmed; sentence reduced.

Solicitor for the accused, appellant: Joseph Sedgwick, Toronto.

Solicitor for the Attorney-General, respondent: C. L. Snyder, Toronto.

[COURT OF APPEAL.]

Rex v. Lou Hay Hung.

Narcotic Drugs—Possession—Sufficiency of Evidence—Occupation of Premises—The Opium and Narcotic Drug Act, 1929 (Dom.), c. 49, ss. 4(1)(d), 17 (as amended)—The Criminal Code, R.S.C. 1927, c. 36, s. 5(2).

A quantity of opium was found by the police in a laundry, and W and the appellant were jointly charged with unlawful possession of it. According to the uncontradicted evidence, the appellant had formerly owned the laundry, and employed W therein, but, about two months before the occasion in question he had sold the business to W, and had remained there as a paid employee. He had a bedroom in the building, but none of the opium was found there. W pleaded guilty, and swore that the opium was hers, that she smoked it, and that the appellant knew nothing about it.

Held, in these circumstances, a conviction of the appellant could not be supported. There was nothing in the nature of personal possession, and s. 17 of The Opium and Narcotic Drug Act, 1929, as amended, did not apply to place any onus upon him, since he could not be said to "occupy" any part of the premises except his own bedroom, in the sense that he had any degree of control over them. *Rex v. Gun Ying* (1930), 65 O.L.R. 369; *Morelli v. The King* (1932), 52 Que. K.B. 440, followed; *Rex v. Irish* (1909), 18 O.L.R. 351, applied.

Per ROACH J.A.: Section 5(2) of The Criminal Code applies to prosecutions under this Act, but under that section an accused can only be convicted, as a joint possessor, if it is shown that he both knows of and consents to the possession of the other person. Here, while it must be found, on the evidence, that the appellant had knowledge, the case was not so developed as to enable the Court to say that he "consented", within the meaning of the section, as interpreted in such cases as *Rex v. Cho Chung* (1940), 55 B.C.R. 234; *Rex v. Lee Chew* (1940), 55 B.C.R. 385; and *Rex v. Colvin and Gladue* (1942), 58 B.C.R. 204.

AN APPEAL by an accused from his conviction for unlawful possession of opium.

17th December 1945. The appeal was heard by ROBERTSON C.J.O. and ROACH and McRUER JJ.A.

E. J. Murphy, K.C., for the accused, appellant: All the Crown evidence at the trial was directed towards proving that the appellant had knowledge of the presence of opium on the premises. Even if this were established, it would not warrant a conviction under s. 4(1)(d) of The Opium and Narcotic Drug Act, 1929 (Dom.), c. 49, which requires actual possession by the accused. It would appear that the magistrate based his conviction upon s. 17, but it is clear that the word "occupies" in that section is used in its narrowest sense, and implies a measure of control of the premises; *Rex v. Gun Ying*, 65 O.L.R. 369, 53 C.C.C. 378, [1930] 3 D.L.R. 925; *Morelli v. The King*, 52 Que. K.B. 440, 58 C.C.C. 120, [1932] 3 D.L.R. 611.

It is clear from the evidence, and not disputed by the Crown, that the accused Watson was the owner and guiding hand in

the laundry, and that the appellant merely occupied one room and did odd jobs. It is also clear that no opium was found in the personal possession of the appellant, or in his bedroom. The appellant's evidence that he owned no opium was corroborated by Watson.

N. L. Mathews, K.C., for the Minister of Justice, respondent: While it is true that no opium was found in the appellant's bedroom, he was working in the rest of the premises and had his meals there, and it was impossible not to find that he was jointly in possession of the large quantities of opium that were scattered throughout the premises. Even if the case does not come directly within s. 4(1) (*d*), there is ample evidence to bring it within s. 17. The appellant had lived in these premises for many years, and had been the owner until two months before the search. Clearly he "occupied" the premises within the meaning of s. 17, and equally clearly he has not proved that the opium was on the premises without his knowledge or consent. As to s. 4(1) (*d*) I rely on *Lamontagne v. The King* (1929), 48 Que. K.B. 474, 54 C.C.C. 338, and as to s. 17 on *Rex v. Lee Fong Shee*, 47 B.C.R. 205, 60 C.C.C. 73, [1933] 3 W.W.R. 204, and the dissenting judgments in *Rex v. Gun Ying*, *supra*.

E. J. Murphy, K.C., in reply.

Cur. adv. vult.

7th February 1946. ROBERTSON C.J.O.:—This appeal involves a question of some importance as to the interpretation of s. 4(1) (*d*) and s. 17 of The Opium and Narcotic Drug Act, 1929 (Dom.), c. 49, as amended. The appellant and one Helen Hazel Watson were charged jointly before Magistrate Prentice with having in their possession unlawfully a drug—to wit, opium, without the authority of a licence from the Minister of National Health and Welfare first had and obtained, or other lawful authority, contrary to s. 4(1) (*d*) of The Opium and Narcotic Drug Act, 1929, and amendments thereto. Counsel for the Crown elected to proceed by indictment, and both of the accused elected to be tried by the magistrate. The Watson woman pleaded guilty, and the appellant pleaded not guilty.

On 17th September 1945, the date on which possession was charged, the police made a search of the premises no. 2373 Queen Street East, in Toronto, and found therein a considerable quantity of opium. Some of the opium was produced by Mrs.

Watson, upon being informed by the police of their business there. Much more was found by the police concealed in one place and another on the premises. There was a noticeable odour of opium in the basement of the premises, and an outfit for smoking opium was among the articles found there.

The premises no. 2373 Queen Street East are used as a laundry, the washing and ironing being done in the basement, while the business with customers who come in is transacted on the ground floor. Mrs. Watson has a room on the ground floor, and the appellant has another. In the basement is a small kitchen, and the appellant had been having his breakfast there when the police came. No opium, or articles for its use, were found in the appellant's room.

According to the evidence of the police Mrs. Watson is the owner of the laundry. There is no contradiction or qualification of this statement in the evidence for the prosecution. According to the evidence of the appellant himself, he works for Mrs. Watson, having sold the business to her about two and a half months before he was arrested. The occasion for his selling the business to her was, he says, that a machine had injured his hand, and he had to sell the business, but continued to live there, occupying a room on the main floor and having his meals down cellar in the kitchen. He denied all knowledge on his part of the use or presence of opium on the premises. Mrs. Watson also gave evidence. She confirmed the statements of the appellant as to his sale of the business to her after hurting his hand. She says he was not of much use, but she kept him around because she could not get other help, and he could help "tie and sort", and do a little washing. Apparently he also did some collecting and delivering. She paid him \$25, whereas he had paid her \$40. Her statement in this regard does not say for what time, but elsewhere it appears to have been the weekly wage. Mrs. Watson says that the appellant knew nothing of the opium, or of the use of opium on the premises, and that a person who is there all the time cannot smell it. She had worked there for three and a half years when the appellant was the owner of the laundry, but did not start smoking opium until after the laundry was her own, and then she smoked it mostly at night when he was in his room upstairs. She said that before she became the owner, she ate opium, but that it was quite easy to eat it and have nobody see it.

The magistrate, in convicting the appellant of having opium in his possession, said that he was satisfied that it would be impossible for the appellant to be there all the time and not know that there was opium there, in view of the quantity found, with the lamps and equipment. Apparently he considered that this one finding was sufficient to dispose of the case.

Section 4(1)(d) of the statute makes it an offence for one to have opium in his possession except under the authority of a licence from the Minister or other lawful authority. The burden of establishing the possession of a licence, or of other lawful authority, is placed upon the accused by s. 15.

It is not open to the Crown, upon the evidence in this case, to question Mrs. Watson's ownership of the laundry business carried on at no. 2373 Queen Street East. That is sworn to by the Crown's first witness, Constable Joynt, whose evidence was expressly confirmed by three other Crown witnesses, and is not contradicted in this particular by anyone. In the absence of any conflicting evidence as to ownership, it is impossible to say that these witnesses did not know what they were talking about—and certainly the Crown cannot say so.

All the opium having been either produced by Mrs. Watson or found elsewhere than in the one room that the appellant had in the premises, nothing of the nature of personal possession in him is disclosed in the evidence. With that circumstance it is proper to consider also that although for twenty years he had carried on the laundry business sold to Mrs. Watson, there is nothing to indicate that in all those years appellant had ever been charged with selling narcotics, or having them in his possession. More important perhaps are the facts in evidence relating to Mrs. Watson. Not only does Mrs. Watson admit that she alone was in possession of the opium, but there is much that confirms that admission. She displayed in the course of her evidence a familiarity with opium in its several states, and with the uses of it, that establishes her as no novice in the trade. Then, as the police themselves testified, she co-operated with, and was of great assistance to, the police, in supplying them with information that led to the apprehension of an important trafficker in narcotics in another Province. This would seem to establish the fact of her connection with the trade in narcotics, at least so far as the purchase of a supply is concerned. There is no

comparable evidence affecting the appellant. In my opinion the evidence definitely falls short of proving anything that amounts to personal possession by the appellant.

Counsel for the Crown relied upon s. 17 of The Opium and Narcotic Drug Act, 1929, as amended in 1938 by c. 9, s. 5. That section is as follows:—

“17. Without limiting the generality of paragraph (*d*) of section four of this Act, any person who occupies, controls, or is in possession of any building, room, vessel, vehicle, enclosure or place, in or upon which any drug or article mentioned in section eleven is found, shall, if charged with having such drug or article in possession (without lawful authority, be deemed to have been so in possession) unless he prove that the drug or article was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof.”

From the fact that the magistrate seems to have deemed the case against appellant concluded by his finding of knowledge by the appellant of the presence of opium on the premises, I assume that the magistrate relied upon s. 17 in convicting appellant. Mere knowledge of the presence of opium on the premises would not be a conclusive element, otherwise than in applying s. 17. The question then arises whether, upon its true construction, that section can be applied to the facts in evidence here. Was opium found in a building, room, vessel, vehicle or place which the appellant occupied, controlled or was in possession of? There is no evidence, nor did the magistrate find, by inference or otherwise, that the appellant controlled or was in possession of the premises in question here, or of any part of them, with the exception of the one room he had there, and nothing to incriminate him was found in that room.

There remains the question whether he occupied the premises or any room wherein opium was found. It was substantially upon the word “occupies”, found in s. 17, that counsel for the prosecution relied in argument of the appeal. He contended that the appellant, with Mrs. Watson, occupied the premises at no. 2373 Queen Street East, and that he was one of the occupants. The words “occupy” and “occupant” have a variety of shades of meaning. No doubt, we commonly speak of the “occupants” of a dwelling-house, meaning thereby all persons who, at the time, live there. We use the word in even a wider sense when we speak

of the "occupants" of premises, meaning thereby all the persons who happen to be within them at the particular time. Primarily, however, "to occupy" means "to take possession", and such wider meanings, while no doubt now well recognized by usage, and proper enough in the right context, are not the only meanings, according even to present common use. The narrower and primary significance has been attached to the word "occupies", as used in s. 17, in two decided cases.

In *Rex v. Gun Ying*, 65 O.L.R. 369, 53 C.C.C. 378, [1930] 3 D.L.R. 925, Mulock C.J.O. said: "In my opinion, the words in sec. 15 [now s. 17], 'occupies, controls or is in possession of any building', etc. are not used in their widest, but on the contrary in their limited, sense, namely, that such occupation, control, or possession must, under the circumstances, be of a nature which goes to support the charge, otherwise the presumption of possession does not arise."

In *Morelli v. The King*, 52 Que. K.B. 440, 58 C.C.C. 120, [1932] 3 D.L.R. 611, Bond J., in referring to s. 4 (1) (d) on the one hand, and s. 17 on the other, said, at p. 127 (C.C.C.): "Here, again, a clear distinction is drawn between actual or physical possession, on the one hand, and constructive or indirect possession *through control*, on the other hand." (The italics are mine.)

There are numerous cases to be found in the reports where it has been pointed out that the words "occupy", "occupier" and "occupant" are ambiguous. In *Paterson v. Gas Light and Coke Company*, [1896] 2 Ch. 476, Lindley L.J. said, at p. 482: "... the term 'occupier' is ambiguous. In one sense a caretaker is an occupier, but in another sense his occupation is that of some other person." See also *Rex v. The Assessment Committee of St. Pancras* (1877), 2 Q.B.D. 581, *per* Lush J. at p. 588: "To take possession", "to be in possession" and "to hold possession" are meanings commonly given the words "to occupy".

To give to the word "occupies" in s. 17 of the statute in question a wider meaning than that ascribed to it in the two cases dealing with the section already mentioned, might well produce unjust and unreasonable results. The head of a family might have opium in his home unlawfully, and this might be well known to his wife and children and servants who lived there with him. It cannot reasonably be thought to be the intention of the statute to make all of them guilty of an offence

and liable to the penalties for keeping opium in their possession. Yet, having knowledge of it, the saving clause in s. 17 would not avail them. In my opinion the proper sense to be attributed to the word "occupies" in s. 17 is the limited sense that will extend the section only to cases where there is the element of control of the premises and of their use in the person charged.

Upon the evidence here it cannot be said that the appellant had any measure of control of any part of the laundry premises, except the one room used as his. Mrs. Watson, who has already been convicted of the offence charged against them jointly, was the only person who occupied, controlled or was in possession of the laundry premises generally. The case developed in evidence for the prosecution appears to have been based upon the assumption that all that was required was a finding of knowledge on the part of the appellant of the presence of opium on the premises. It may be that enquiry along other lines might have disclosed facts that would have supported a very different case. It may be that counsel for the prosecution should not have been content with the bare statement by the police that Mrs. Watson is the owner of the business and the appellant is her employee. It may be that further enquiry would have revealed a situation that would have warranted a finding that the appellant had some measure of control of the premises and had some connection with the considerable quantity of opium concealed there. This, however, is all surmise. The prosecution made no such case, and there is nothing in the evidence that would support any such findings of fact. The only finding of fact made by the magistrate is not sufficient to support the conviction. We have no option, therefore, but to allow the appeal and quash the conviction.

ROACH J.A.:—The appellant and one Hazel Helen Watson were jointly charged that on the 17th day of September 1945 they unlawfully did have in their possession a drug, to wit, opium, without the authority of a licence from the Minister of National Health and Welfare first had and obtained, or other lawful authority, contrary to s. 4(1)(d) of The Opium and Narcotic Drug Act, 1929, and amendments thereto. The Crown proceeded by indictment and the accused elected summary trial by the magistrate. Helen Watson pleaded guilty and the appellant not guilty. The appellant was convicted following his trial, and from that conviction he now appeals.

On the 17th day of September 1945 officers of the Royal Canadian Mounted Police raided the premises known as 2373 Queen Street East, in the city of Toronto. Those premises were being used for the operation of a laundry business. They consisted of a basement and a floor on the street level. In the basement were a kitchen, a washing room and an ironing room. On the street-level floor at the front was a waiting room where customers delivered and received their laundry, and somewhere at the rear thereof were two bedrooms.

When the officers arrived the appellant was eating his breakfast in the kitchen, and he came up to the waiting room to meet them. Two of the officers seized him and the other two proceeded to the basement, where they found the accused Watson. The appellant was then brought to the basement, and in the presence of both accused the officers disclosed their identity and stated that they intended to search the premises. The accused Watson said that she had two decks of opium in the pocket of her blouse, which was on the ironing table in the ironing room. Following that disclosure the officers recovered those two decks, and proceeded to make a further search. Then the accused Watson said that she had another package which contained the rest of the opium, and she produced from under the sink in the washing room a cigarette package, which contained nine decks of opium. Not satisfied, the officers searched further, and under the same sink they found forty-five more decks of opium in two coffee cartons, and also a single deck elsewhere, under that sink. In the ironing room, on the ironing table, they found an opium pipe and a lamp, the bottle of the pipe being in plain view and the lamp and stem hidden behind, or under, some irons. The pipe contained opium. Under the ironing table, in an old shoe, they found a can containing about 800 grains of cooked opium, and another can containing about 250 grains was hidden in an old sock in another old shoe. On a table in the ironing room, in plain view, they found an improvised opium lamp containing opium, and inside a magazine on that table were two empty deck-wrapping papers, to which traces of opium were later found to be adhering. These papers were similar to a large quantity of unused deck-wrapping papers which the officers also found in a cupboard in the kitchen. On a barrel at the end of the ironing table the officers found another book with a cylindrical section

cut out from a number of pages, which the officers testified could be used as a pocket in which opium decks could be secreted for shipment. Also, in a sewing machine in the ironing room the officers found an eye-dropper and decking papers and a jack-knife with traces of opium adhering thereto, and also a match-box containing opium dross, that is, the ashes of opium. In the kitchen, hidden in a carton of blueing, they found a tin of opium in liquid form, the grain content of which was estimated at about 300 grains. Also in the kitchen, on a shelf, they found two cans with traces of opium. At some place in the basement—the exact location is not clear in the evidence—they found a shaving-soap tin containing opium in paste form, a match-box and a vial each containing traces of opium, a cigarette package containing opium dross, part of an opium pipe and an improvised lamp. In the basement there was the distinctive odour of opium, which the officers testified was “quite noticeable”. No opium was found elsewhere in the premises or on the person of the appellant.

As part of the Crown's case it was stated in evidence by one of the officers that the accused Watson was “the owner of the laundry”.

The appellant gave evidence on his own behalf and swore that he formerly owned the laundry, but that about two and a half months prior to the raid he had injured his hand in a machine, and as a result he had sold the business to the accused Watson, who had worked for him for about three and a half years, and thereafter he was her employee; that he occupied one of the bedrooms and the accused Watson occupied the other. He denied that he owned the opium or that he had ever seen it or any of the articles which the officers had found. He denied any knowledge that the accused Watson was in the habit of smoking opium in the premises, and said he never smelled it.

The accused Watson gave evidence. The record states that she was a witness on her own behalf, but that is obviously wrong, as later appears in the evidence. She was a witness called on behalf of the appellant. She corroborated the appellant's story with respect to the sale to her of the business, and that he was only her employee. She accepted full responsibility for the presence of the opium and all the containers and smoking equipment. She swore that as far as she knew the appellant did not know that there was opium on the premises or any smoking

equipment; that the lamp—apparently the one which the officers had described as an “improvised” opium lamp—was used for burning perfume; that she did not smoke opium in the presence of the appellant, and that whenever she wanted to gratify her desire to smoke it, if he was present she used to tell him “to go and collect or deliver or go to bed”; that she had opium on the premises for about two years, but that up until she became the owner of the business she used to eat it, and began to smoke it only after she became the proprietor. Asked as to the opium smell which the officers said was so noticeable in the basement, she explained that fact by stating that at that particular time she was cooking some in water.

Obviously the magistrate did not believe either the appellant or the accused Watson. He said: “I am satisfied it would be impossible for him to be there all the time, having lived there for twenty years, and still residing there at the time of the seizure, and not know that there was opium there, when there were over 4,000 grains, with the lamps and all the equipment in connection with the layout on the table.” He makes no specific reference to the story told by the appellant and Watson as to the alleged change in ownership of the business.

The relevant sections of The Opium and Narcotic Drug Act, 1929, are as follows:

“4(1) (d) Every person who has in his possession any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority shall be guilty of an offence, and shall be liable” to the penalty therein stated.”

“17. Without limiting the generality of paragraph (d) of section four of this Act, any person who occupies, controls or is in possession of any building, room, vessel, vehicle, enclosure or place, in or upon which any drug is found, shall, if charged with having such drug in possession without lawful authority, be deemed to have been so in possession unless he prove that the drug was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof.”

If the appellant, at the time of the seizure, had been the proprietor of the business, then there could be no question as to his conviction, because, as proprietor, he would be occupying, controlling and in possession of the room in which the opium

was found, and because he failed to prove it was there without his authority, knowledge or consent.

If, however, at the time of the seizure the appellant was only a servant of Watson, then he was not in control or possession of the basement. Was he occupying it within the meaning of the section?

In *Rex v. Irish* (1909), 18 O.L.R. 351, 14 C.C.C. 458, the accused was convicted of a breach of that portion of s. 50 of The Liquor License Act, R.S.O. 1897, c. 245, which read as follows:

"Nor shall the occupant of any such shop, eating house, saloon, or house of public entertainment, unless duly licensed, permit any liquor, whether sold by him or not, to be consumed upon the premises, by any person other than the members of his family or employees, or guests, not being customers."

On a motion to quash the conviction, Mulock C.J. Ex.D. (as he then was) said: "A person to be liable under sec. 50 for permitting liquors to be consumed on unlicensed premises must be the occupant thereof within the meaning of the section. He must not only be such occupant, but his occupancy must be of a nature that clothes him with authority to permit, and inferentially not to permit, liquor to be consumed thereon. The 'occupant' within the meaning of this section must be a person enjoying such possession or control over the premises as entitles him to regulate the use which is being made of them. Explicit language would be necessary in order to make criminally liable for acts committed on the premises a person not having the legal control thereof, or not in a position to prevent the commission of such acts . . . occupancy here means legal possession or control."

In *Rex v. Gun Ying*, 65 O.L.R. 369, 53 C.C.C. 378, [1930] 3 D.L.R. 925, this Court, *per* Mulock C.J.O., held that the words "'occupies, controls or is in possession of any building,' etc. are not used in their widest, but on the contrary in their limited, sense, namely that such occupation, control, or possession must, under the circumstances, be of a nature which goes to support the charge, otherwise the presumption of possession does not arise." In that case the opium was found under a bed in a bedroom in the accused's home in Toronto. The wife of the accused and another Chinese, who resided elsewhere in Toronto, were

in the room at the time of the seizure, and there was evidence of smoking. The accused swore that he had left the city on the previous day and had not returned until three days after the seizure, and that he had no knowledge of the opium in question, and, of course, having had no knowledge, that he had not consented to or authorized it being there. This Court quashed the conviction, Magee and Hodgins JJ.A. dissenting, and Mulock C.J.O., speaking for the majority of the Court, said: "In discrediting a witness every judicial officer owes it to the witness and also to an appellate court to state his reasons. This the convicting magistrate has not done. Evidence under oath, until shaken, is entitled to some weight, and it cannot be swept away simply by the trial judge saying he disbelieves a witness. In this case the evidence of the accused is uncontradicted and is entitled to some weight." This Court quashed the conviction on two grounds: first, that the accused had discharged the onus cast upon him; second, that at the time of the seizure the accused did not have occupation, control or possession within the meaning of s. 15 of the Act, now s. 17. I cannot understand why, if the accused did not have such occupation, control or possession, it should have been said that he had satisfied the onus cast upon him, because, unless he had such occupation, control or possession, there was not a *prima facie* case against him, and, therefore, no onus existed. I think the decision must be read as meaning that the accused did not, in the circumstances, have such occupation, control or possession, and further, that even if it could be held that he did, the evidence was such as to satisfy the onus.

Here, as in that case, the accused has sworn that he had no knowledge that opium was in the premises, but while in that case it was possible that the accused had no such knowledge, here, in my opinion, such professed ignorance was impossible. Here, the proven facts fairly screech forth such knowledge—the opium pipe and lamp on the ironing table, the improvised lamp on a table near to the ironing table, and the odour of opium permeating the whole basement. The story told by the appellant that he had no knowledge of these things is fantastic and incredible.

Having regard to the factual evidence given by one of the Crown witnesses that Watson was "the owner of the laundry",

and applying to the other evidence of ownership what was said by this Court in the *Gun Ying* case, that evidence under oath, until shaken, is entitled to some weight, I think it must be held as an established fact that such a sale had taken place and that Watson had become the proprietor and the appellant merely her employee. In that set of circumstances was the appellant occupying or in control or in possession of the basement within the meaning of the Act? In my opinion he was not. He "occupied" his bedroom, he worked and ate his meals elsewhere in the building, but, in my view, he could no more be said to be occupying or in control or in possession of the basement, or any part of the premises outside of the bedroom, than a workman could be said to be occupying or in control or possession of a factory in which he was employed with a hundred or more other employees. Therefore, there was no onus placed upon the appellant by virtue of s. 17.

I think there is much in the evidence that at least suggests joint possession of the opium by the appellant and Watson within s. 5(2) of The Criminal Code, R.S.C. 1927, c. 36. That section is as follows:—

"If there are two or more persons, and any one or more of them, with the knowledge and consent of the rest, has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them."

That section was not referred to by counsel during the argument, and apparently was not considered in the court below. I have not found any decision in the courts of this Province in which the applicability of the section to offences under The Opium and Narcotic Drug Act has been considered. In my opinion it is applicable to such offences. The Court of Appeal for British Columbia has so held in *Rex v. Cho Chung*, 55 B.C.R. 234, 74 C.C.C. 250, [1940] 3 W.W.R. 79, [1940] 3 D.L.R. 533.

Under s. 5(2), both "knowledge" and "consent" are necessary. I have already stated that, in my opinion, there is no doubt that the appellant knew that the accused Watson had opium in the premises. I have been more than a little concerned with the question whether or not, on the evidence, it should be held that he also consented.

The meaning of the word "consent", as it appears in that section, has been considered by the British Columbia Court of Appeal in three cases: *Rex v. Cho Chung*, *supra*; *Rex v. Lew Chew*, 55 B.C.R. 385, 74 C.C.C. 230, [1940] 3 W.W.R. 285, [1940] 4 D.L.R. 571, and *Rex v. Colvin and Gladue*, 58 B.C.R. 204, 78 C.C.C. 282, [1942] 2 W.W.R. 465, [1943] 1 D.L.R. 20. In the first of those cases the accused called to transact business with a friend. On his arrival the friend was smoking opium and refused to discuss the business until he had finished smoking. The accused sat down to wait, and, while he was waiting, the police arrived. The magistrate believed the accused's story and dismissed the charge. On appeal by the Crown on a question of law, the Court of Appeal held that the facts did not disclose consent within s. 5(2) of The Criminal Code.

In the *Lew Chew* case the accused was in the act of purchasing a deck of opium from an opium runner. He had paid for it, but it had not been handed over to him, when the police intervened, and the runner threw it away. The magistrate dismissed the charge, but the majority of the Court of Appeal allowed the Crown's appeal.

In the *Colvin and Gladue* case the respondents were found in a room occupied by one Herman Singh, who had morphine in his possession. The circumstances were such that all three were charged with unlawful possession. Singh pleaded guilty. The respondents pleaded not guilty, and, following their trial, were acquitted, the magistrate holding that although they had knowledge of, they did not consent to, the personal possession by Singh. It is interesting to note the circumstances which existed there, as they appear from that part of the magistrate's observations quoted by Fisher J.A. He said: "I don't have any doubt in this case that these two men knew everything that was going on, hanging around that room; they saw this brew on the stove, a hypodermic needle on the floor; one was lying on the bed, apparently asleep; they had been there since 5 o'clock in the morning. It is a very funny thing they would not know about this mess on the stove and find out about it, be curious about it. I do not accept their story on that at all." On an appeal by the Crown the Court divided three to two, and in the result the appeal was dismissed.

I agree with the observation of Macdonald C.J.B.C. in the *Cho Chung* case that it would be unwise "... to attempt to give one definition only of the word 'consent' broad enough to cover all cases. Several meanings may be given to the word; one or the other might fit the facts of a particular case."

On the other hand, in the *Colvin and Gladue* case O'Halloran J.A. said: "The 'knowledge and consent' which is an integral element of joint possession in section 5, subsection 2 must be related to and read with the definition of 'possession' in the previous section 5, subsection 1(b). It follows that 'knowledge and consent' cannot exist without the co-existence of some measure of control over the subject-matter. If there is the power to consent, there is equally the power to refuse and *vice versa*. They each signify the existence of some power or authority which is here called control, without which the need for their exercise could not arise or be invoked."

I should think that, where one of two persons has opium in his custody or possession, another who knows that fact, even though he has no measure of control over it, but nevertheless co-operates with the person who has such custody in an effort to prevent detection, thereby "consents" within s. 5(2). To my mind the evidence here certainly suggests such co-operation and active assistance, going beyond mere indifference or negative conduct on the part of the appellant. For example, the odour of opium was "quite noticeable" in the basement. There was evidence that if the door at the stairs leading from the basement was kept shut it would be "pretty hard for the odour to go upstairs". The accused Watson must have been a very busy woman after the appellant suffered his physical disability. Thereafter he could only do light work, which evidently included running up from the basement to attend to customers. Did he keep the door closed on such occasions in order to confine the odour to the basement and thereby prevent detection? One might speculate that he did, but a conviction should not be founded on speculation. The evidence must prove guilt beyond a reasonable doubt. That feature of this case might have been pursued further in evidence and put beyond doubt one way or the other. After considerable hesitation I have concluded that as the record now stands there is such doubt, and of course the appellant is entitled to the benefit of it.

The appeal should be allowed and the conviction quashed

MCRUER J.A.: The facts of this case are fully set out in the judgments of my Lord and my brother Roach. I think the words "who occupies" as used in s. 17 of The Opium and Narcotic Drug Act, 1929, must be interpreted in the light of the provisions of the statute as a whole. An accused may be the sole occupant, or a joint occupant. In this case the appellant was undoubtedly one who occupied the building for many years by any interpretation of the words of the statute. The business was carried on by him with the assistance of his co-accused. During this time opium was undoubtedly kept on the premises by the accused Watson. Two months and a half before the premises were entered by the police officers it is said that the appellant disposed of the legal ownership of the business to his co-accused Watson, but continued to assist in carrying it on, receiving a weekly wage for the assistance rendered. I think that this case might well have been developed to show that at the time the police officers entered the premises the appellant, together with his co-accused, jointly occupied the premises in question within the meaning of s. 17 of the Act, but the evidence adduced falls short of supporting such a finding.

I reluctantly agree that this appeal should be allowed.

Appeal allowed.

Solicitor for the accused, appellant: E. J. Murphy, Toronto.

Solicitor for the Crown, respondent: N. L. Mathews, Toronto.

[COURT OF APPEAL.]

Hunsinger v. The Town of Simcoe.

Highways — Constitution — Dedication and Acceptance — Sufficiency of Evidence — Nature of Public User.

A strip of land in a town block was used as a lane. There had never been any formal dedication of it as such, or acceptance by the municipality, and it was not shown on the registered plan, but the evidence was that it had existed for over fifty years. At the beginning of that period it had been fenced, but the fences had disappeared in the meantime. It had been used, not only by the owners of abutting properties, but by the public generally, as a short cut between two streets. Those who thus used it were all those whose business or pleasure took them from one street to the other, and they included pedestrians and persons driving delivery vehicles. Throughout this period the user by the public was such that the owner of the fee from time to time must have been aware that the public were acting under the belief that the lane was a public thoroughfare and that they were entitled to use it as a matter of right. The title to the lot of which this lane was a part had not been mortgaged before 1934. At least as early as 1919 the municipality ceased to tax the lane, and from 1917 on it expended public moneys in maintenance and repairs. *Held*, the proper conclusion from this evidence was that the strip of land in question had become a lane by dedication and acceptance. Commencing with the owner fifty years before, and continuing through the successive owners, there had been an intention on the part of each of them to dedicate the lane as a public thoroughfare. This offer to dedicate could be accepted by the municipality at any time before the giving of the mortgage in 1934, and it had in fact been accepted much earlier than that. The ceasing to tax the lands had evidenced an intention to accept the offer of dedication, and if the assessment notices were not a sufficient communication of that acceptance, then when the municipality began to expend public moneys on the lane, to the knowledge of the owner of the fee, he must have become aware of the acceptance.

Appeals—Reversal of Findings of Fact—Trial Judge erroneously Holding that Evidence Lacking on Particular Point.

Where a trial judge bases his judgment, not upon the credibility of witnesses, or the weight of the evidence, but upon an erroneous statement that there is no evidence to support the contention of one of the parties, the Court of Appeal, not being restrained by any express or implied findings as to credibility, is free to review the record, and, if it disagrees with the trial judge's conclusion, to deliver the judgment which, in its opinion, should have been pronounced by him. *Fulton et al. v. Creelman*, [1931] S.C.R. 221, applied.

AN APPEAL by the defendant from the judgment of Chevrier J., after a trial without a jury, in favour of the plaintiff.

15th and 16th January 1946. The appeal was heard by HENDERSON, LAIDLAW and ROACH JJ.A.

W. P. Mackay, K.C., for the defendant, appellant: It is not necessary to prove express dedication. Dedication may be presumed, or implied from long-continued user: *Turner v. Walsh* (1881), 6 App. Cas. 636 at 639-40; *Folkestone Corporation v. Brockman et al.*, [1914] A.C. 338 at 364, 375. Nearly all such

cases must be determined on circumstantial evidence, no direct evidence being available: *Maccoomb et al. v. Town of Welland* (1907), 13 O.L.R. 335 at 345.

The evidence here is amply sufficient to justify an inference both of dedication and of acceptance by the municipality.

F. J. Hughes, K.C. (A. W. Winter, with him) for the plaintiff, respondent: The question at issue is solely one of fact, depending upon the evidence, and it has been decided by the trial judge in our favour: *Batt v. Village of Beaverton*, 52 O.L.R. 159, [1923] 3 D.L.R. 424; *Baldwin v. O'Brien* (1917), 40 O.L.R. 24.

The defendant may have proved that there was an established lane, but that is not enough to show that it was a public lane. User by the public must be shown. There is no evidence whatever in the record that any owner contemplated the dedication of this lane to public use. The land in question was not a road upon which public money had been expended in opening it, nor was it one upon which statute labour had usually been performed. [ROACH J.A.: Was there not a dedication by implication?] There is also no evidence of acceptance by the municipality. It never did any corporate act which would constitute the doing of public works upon it.

The trial judge made findings of fact, well supported by the evidence, and there should be no disturbance of such findings: *Powell et ex. v. Streatham Manor Nursing Home*, [1935] A.C. 243 at 249-50. Dedication or no dedication is a question of fact, and the duty of the Court of Appeal is set forth in the case just cited. The paper title to the strip of land in question is in us, and from 21st November 1934 the title was continuously subject to a mortgage. The public lane alleged by the appellant is not shown upon any plan. The plaintiff and her predecessors in title have been assessed for the land and have paid taxes upon it.

The appellant has the burden of showing clearly that the trial judge erred in his findings of fact. It is not enough, where there was conflicting evidence for him to weigh, to say that the evidence for one side was stronger than that for the other.

W. P. Mackay, K.C., in reply: The owner's intention to dedicate may be inferred from long-permitted user: *City of Ottawa v. Grand Trunk R.W. Co.*; *City of Ottawa v. Ottawa and New York R.W. Co.* (1921), 50 O.L.R. 239, 64 D.L.R. 337. There is evidence of acceptance by the municipality in the non-assessment

of the strip in question. The plaintiff, by her admission as to the acceptance of an "established lane", is now estopped from contending the contrary. She is further estopped from alleging that the strip in question is not a public lane by the fact that she herself used it as a means of access to her garage. *Baldwin v. O'Brien, supra*, is distinguishable from the present case, because there it was sought to prove express dedication.

Cur. adv. vult.

13th February 1946. The judgment of the Court was delivered by

ROACH J.A.:—The plaintiff brought this action to recover damages for trespass to lands allegedly owned by her, and for an injunction restraining the defendant, its agents or employees from entering thereon. The defendant answered that the lands in question constituted a public lane or thoroughfare, and that the servants of the defendant entered thereon for the purpose of removing certain fences and buildings which the plaintiff was maintaining thereon, and which prevented public traffic along the said lands.

The learned trial judge granted the injunction in the terms prayed for and awarded the plaintiff the sum of \$300 damages for trespass. His reasons therefor are short and I quote them in full:

"On the evidence I find that there is no evidence on the part of the owners of the fee of any *animus dedicandi* of the lands in question.

"Even if the evidence did disclose such *animus dedicandi*, there is no evidence that the defendant corporation did such works on said lands which would amount to an acceptance of such dedication."

From that judgment the defendant now appeals.

The lands in question consist of the southerly part of lot 6 according to registered plan 20-B for the town of Simcoe, running from Norfolk Street on the west to Bank Street on the east. For convenience's sake I will hereinafter refer to them as "the lane".

For the better understanding of the locus, I should say that King's Highway no. 3 runs approximately east and west. Bank Street commences at Highway no. 3 and runs approximately

north, apparently terminating at Patterson Creek, and is 33 feet in width. Norfolk Street runs parallel to Bank Street and is part of King's Highway no. 24. It intersects Highway no. 3 and continues across Patterson Creek to the north. The course of Patterson Creek is approximately north-west and south-east. The lots laid out on plan 20-B are numbered consecutively from south to north and run from Norfolk Street to Bank Street, a distance of 330 feet. The northerly limit of lot 8, which is a gore lot, is the centre line of Patterson Creek. The southerly limit of the lane is the lot line between lots 5 and 6, and is 382 feet from the northerly limit of Highway no. 3.

Subject to the ownership of the lane, the plaintiff is the owner of approximately the west half of lot 5, all of lot 6, the southerly part of lot 7, from Norfolk Street to Bank Street and the easterly part (approximately the east half) of the balance of lot 7 and of lot 8.

That part of lot 5 owned by the plaintiff was acquired by her from George Heath by deed dated 11th June 1923. The northerly limit of the lands thereby conveyed is therein described as the southerly limit of "an established lane". The north side of the dwelling on this land is only about 3 feet south of the lot line between lots 5 and 6. Subsequent to the date when the plaintiff purchased these lands, and prior to 1937—the year does not appear in the evidence—she caused a garage to be erected thereon almost directly to the rear of the dwelling. Access to the garage has always been via the lane from Norfolk Street.

On lot 6 there is a small frame barn, standing back some distance from Norfolk Street and about opposite the garage on the part of lot 5 owned by the plaintiff. The southerly side of that barn is 9.7 feet from the lot line between lots 5 and 6. Access to that barn has apparently always been via the lane from Norfolk Street. That barn has been standing in its present location since at least as early as 1916.

The lands comprising the lane are nowhere described otherwise than as a thoroughfare sufficiently wide to accommodate four-wheel vehicular traffic, and passing between the barn and the lot line between lots 5 and 6, and extending from Norfolk Street to Bank Street. If it became a public thoroughfare it was because of implied dedication by the owner of the fee in lot 6 and acceptance by the municipality. Both dedication and acceptance are

questions of fact to be established by evidence. When the learned trial judge held that there was no evidence of either, in my opinion, he was clearly mistaken. He does not found his judgment on the weight or credibility of the evidence but upon a denial that there was any evidence. Counsel for the plaintiff respondent argued that, since both dedication and acceptance are questions of fact, this Court should not disturb the finding of the learned trial judge. I can understand that argument being advanced had the judgment proceeded upon the weight or credibility of evidence, but it is not an answer where, as here, the judgment results from misdirection, such misdirection consisting in the denial that there is any evidence.

In *Fulton et al. v. Creelman*, [1931] S.C.R. 221, [1931] 1 D.L.R. 733, Newcombe J., speaking for the majority of the Court, said, at p. 225:

"The defendant might, of course, have encountered serious difficulty to overcome the trial judgment if it could be held to have proceeded upon the weight or credibility of the evidence; but this, with due respect to the learned judge, is a plain case of misdirection; and, in the result, instead of considering the probabilities of the case and the inferences which it legitimately suggests, he founds his judgment upon a denial of the evidential quality or value of the facts upon which the defendant relies."

This Court is therefore free to review the record without the restraint of any expressed or implied findings by the trial judge as to credibility, and, if in disagreement with the learned trial judge, to deliver the judgment which in its opinion should have been pronounced by him.

Before referring to other evidence it may be well to refer to the state of the paper title of lot 6 from time to time, as disclosed by the registrar's abstract which has been filed as an exhibit. The abstract commences in the year 1900. At that time Priscilla Draper owned lot 6. How long she had been the owner does not appear from any other evidence. On 24th November 1903, she conveyed lot 6 to Anna Eliza Draper, reserving a life estate. Anna Eliza Draper died on 17th March 1912, leaving a will by which she devised all her real estate to her husband Frederick William Draper, and by a deed dated 28th December 1912 her husband, as executor of her estate and in his personal capacity, conveyed lot 6 and other land to the north thereof to George A. Heath. Heath retained ownership until April 1913.

The subsequent owners, disregarding for the time being mortgages to which I will later refer, were as follows:

Abram Wilson, from April 1913 to May 1916;

Stanley Woolley, from May 1916 to November 1920;

Watson Woolley, from November 1920 to 1st March 1922;

William Henry Hurst, from 1st March 1922, to his death on 2nd April 1943.

On 13th December 1943 the executors of Hurst's estate conveyed lot 6, among other land, to the plaintiff.

Registered encumbrances from time to time against lot 6 are as follows:

Local improvement assessments for the construction of a sidewalk on Norfolk Street pursuant to by-law no. 374 of the Town of Simcoe, .039 cents per foot frontage in each year for 20 years, expiring in 1924,

Mortgage, dated 21st November 1934, from William Henry Hurst to Charles A. Street; discharged 20th May 1941, the discharge being registered prior to

Mortgage, dated 20th May 1941, from William Henry Hurst to Charles B. Hewitt; discharged 13th December 1943, the discharge being registered prior to

Mortgage, dated 13th December 1943, from the plaintiff to the estate of William Henry Hurst.

The importance of those encumbrances is as follows:

As to the mortgages—A mortgagor in possession cannot defeat his mortgagee's title by giving the land to the public: *vide Batt v. Village of Beaverton*, 52 O.L.R. 159, [1923] 3 D.L.R. 424.

As to local improvement assessments—It would be inconsistent with acceptance by the municipality of an offer to dedicate for it to assess the frontage of the lane for local improvement rates, or indeed for any rates, or, if dedication and acceptance took place during the currency of by-law 374, to continue to levy for such rates on that frontage.

Turning now to the other evidence: The defendant called two witnesses whose earliest knowledge of the existence of this lane and its user dated back to at least fifty years ago. At that time there was a broom factory on some part of lot 5. Its exact location on that lot is not definitely described by them, but it was

about where the plaintiff's garage now stands. There was a soap factory, and also an ice house from which ice was retailed, on the east side of Bank Street, about opposite the lane. The lane was fenced on both sides with a picket fence, commencing about the broom factory and extending east to Bank Street. Access to the broom factory was via the lane, and wagons and other rigs used the lane to get from Norfolk Street to the ice house and the soap factory. Just when the ice house, soap factory and broom factory ceased to exist does not appear in evidence; nor does it appear what happened to the fences. This much is made certain by the evidence, that from their earliest recollection the lane has been in existence and used by pedestrians, delivery wagons and similar vehicles until it was obstructed in 1943 by the son of William Henry Hurst following his father's death in April of that year. The lane had a width, between the original fences, estimated by those witnesses at 10 to 12 feet.

Stanley Woolley gave evidence for the plaintiff. It will be recalled that he owned lot 6 from May 1916 to November 1920, and his father Watson Woolley owned it from November 1920 to March 1922. The residence on lot 6 was in existence as early as May 1916, because it was occupied by Watson Woolley from May 1916 to March 1922. Prior to 1916 there had been a fence along the west side of Bank Street from the lane north to Patterson Creek, but by 1916 it had become very dilapidated. By 1916, also, wooden fences along the north and south sides of the lane, to which I have referred, and the broom factory, ice house and soap factory, had disappeared from the scene. Stanley Woolley lived out in the country and his visits to his father's home on lot 6 were infrequent, and his knowledge of the user of the lane in those years is little. Occasionally he delivered a load of hay to his father's barn and he described the lane east of the barn to Bank Street as just a pair of tracks, indicating that vehicles had been driven over it. The land north of the lane on the east side of Bank Street was used by his father as a garden.

In 1923 the plaintiff's residence was built on the west half of lot 5. In 1925 a residence was built on the east half of lot 5 and was immediately occupied by one Petit. He was a fish peddler and used to drive his fish-peddling outfit along the lane

from his garage to both Norfolk Street and Bank Street. Subsequent to 1925 two other residences were built on the west side of Bank Street south of Petit's residence.

I think this is a fair summary of the evidence as to the user of the lane, namely, that commencing more than fifty years ago and continuing until it was blocked by Hurst in 1943, it was used without interruption not only by those whose property abutted on it but by the public as a short cut from Norfolk Street to Bank Street, instead of the longer route via Highway no. 3. Those of the public who thus used it were all those whose business or pleasure took them from one street to the other. They included pedestrians and persons driving delivery vehicles of one kind and another. In the earlier years the traffic was lighter than in the later years, when the district became more populated, but throughout all those years the user by the public was such that the owner of the fee from time to time must have been aware that the public were acting under the belief that the lane was a public thoroughfare and that they were entitled to use it as a matter of right, and those respective owners took no steps to disabuse them of that belief. There is not a scintilla of evidence of any objection to that user by anyone entitled to object.

An abstract of the title of lot 5 has not been filed as evidence, but it is of some importance to note that George A. Heath, from whom the plaintiff purchased lot 5 in June 1923, had also been the owner of lot 6 and the south and easterly parts of lot 7 and the easterly part of lot 8 (all acquired by the plaintiff in 1943) from December 1912 to 29th April 1913. The "established lane" referred to in the deed from Heath to the plaintiff is doubtless the lane described in evidence by witnesses whose memory carried them back to the last century, when the broom factory was in existence. It is not referred to in any of the conveyances of lot 6. Each of the successive owners in the chain of title to lot 6 by the conveyance to them acquired the whole of lot 6, and by the conveyance from them conveyed the whole of that lot. That circumstance was stressed with confidence by counsel for the appellant, as negating the idea that any one of them had become divested of the title to the lane by dedication and acceptance. That argument, while entitled to its due weight, in my opinion is not conclusive. We have all had experience with slavish adoption of legal descriptions in conveyancing practice

resulting in error, and the description contained in the conveyance from Draper to Heath has been followed in all the subsequent conveyances.

Lot 6, including the frontage of the lane, and the southerly part of lot 7, has a total frontage on Norfolk Street of 74.92 feet. Subsequent to the construction of the sidewalk on Norfolk Street, as authorized by by-law no. 374, a sanitary sewer and a hard-surfaced roadway were constructed on Norfolk Street, both as local improvements, the sewer in 1919 and the roadway in 1921. The frontage on the lane was not assessed for these local improvements. Indeed, the total frontage of the lane, exempt from those local improvement rates, was 12 feet. The schedule attached to and forming part of by-law no. 374, showing the various frontages assessed for the local improvement thereby authorized, is confusing. It shows lots 6 and 7 as being assessed to Fred W. Draper and consisting of the lands extending from William Waddell's to Patterson Creek, and having a total frontage of 165.4 feet. The total frontage of lots 6 and 7 is actually only 132 feet. It is obvious that the total frontage assessed to Draper included part of lot 8. Looking at the plan filed as an exhibit, the sidewalk did not extend to the bank of the creek. Therefore, it is impossible to determine from the evidence just how much of the frontage of lot 8 was assessed for the cost of the sidewalk, and it is also impossible to determine whether the frontage of the lane was assessed for that purpose.

Commencing at least as early as 1935, and continuing to date, the lane was not actually assessed for general taxes levied by the Town. None of the town officials who gave evidence was asked as to earlier years. It is unfortunate that they were not, but, having regard to the fact that the lane was not assessed for local improvements, it would not be a rash assumption that it was not assessed for general rates. It is true that the tax demands for the years 1935 to 1939 inclusive, and for 1944, show that the taxes thereby demanded were in respect of lot 6, but the fact remains that the amounts of the taxes for those years were computed on the frontage assessed.

One Laurie, an employee of the municipality, gave evidence. He commenced working for the municipality in 1917, and stated in evidence that in that summer, and in the summer of 1918,

he drove the town's water sprinkler along that lane, watering it as he did other highways in the town. At some later date the municipality abandoned the practice of road-sprinkling with water, and commenced sprinkling with oil, using first a horse-drawn vehicle and latterly a motor-drawn vehicle. Up to and including 1929, a light oil was used for that purpose, but commencing in 1930 the municipality began using liquid asphalt, and thereafter this lane was treated the same as other roadways of similar physical character in the town. Hot liquid asphalt was spread on the surface by a motor-driven mechanical distributor; that was followed immediately by another similarly driven distributor, which spread a thin layer of stone, which had been crushed to fine dimensions, and that, in turn, was followed by a heavy motor-driven roller, which packed the crushed stone into the hot asphalt and imbedded the mass into the surface of the lane. By treating the surface in that manner in succeeding years the surface of the lane became coated with a layer resembling tarvia. There is some conflict in the evidence as to the years following 1930 in which the surface of the lane was thus treated, but I do not think it is overstating the evidence to say that it discloses that this particular work was done in each alternate year from 1930 to 1940, and was discontinued then, due to the exigencies of the war.

In 1935 Patterson Creek overflowed its banks and damaged the lane. The municipality repaired the damage by dumping and spreading gravel over the damaged area.

One Clifford O. Hurst, a son of William Henry Hurst, gave evidence. He it was who, following his father's death in April 1943, had the property surveyed in July 1943, and obstructed the lane by fences, and sold lot 6 and the adjoining property owned by his father to the plaintiff in December 1943. He did not reside on lot 6, but even in his father's lifetime he took considerable interest in his father's property. He told something of the activities of one Catherwood, who established a junk-yard on the east side of Bank Street, north of the lane, about 1939. Catherwood also had a junk-yard on the west side of Norfolk Street, north of the lane, and used the lane for transporting junk from one yard to the other. His junk-heap on the Bank Street property overflowed not only out into Bank Street, but also on to the Hurst property on the west side of Bank Street. Hurst

was attempting to sell his father's property for him and the appearance of the junk on Bank Street spoiled several sales. Annoyed by that fact, the son complained to the municipal authorities, and as a result the junk was removed off the street. He knew that Catherwood was hauling junk back and forth across the lane, but, on his own evidence, he never objected, notwithstanding that, as appeared from other evidence, on one occasion Catherwood's truck tore the corner boards and the eavestrough off Hurst's garage, when he was attempting to squeeze through with a wide load. It may be that Hurst never learned of that fact, but that would appear unlikely.

With great respect to the learned trial judge, it is my opinion that there was substantial evidence of dedication of the lane to the public and acceptance by the municipality.

Counsel for the respondent propounded the question in this court: "Who dedicated it, and when?"

In my opinion the evidence plainly justifies this conclusion, *viz.*, that commencing with the owner fifty years ago, when the lane was fenced—that is, the east part—and thereby in that sense separated from the balance of lot 6 and the lands lying to the north thereof, and continuing down through the various owners to and including Hurst, there was an intention on the part of each of those owners in succession to dedicate the lane as a public thoroughfare. At any time up to 21st November 1934 the municipality could have accepted the offer to dedicate. By-law no. 374, even if it imposed any rates on the lane, would not have prevented acceptance. Those rates, by appropriate measure, could have been absorbed by the municipality. From 21st November 1934 forward the offer to dedicate could not be accepted, because the rights of mortgagees intervened, but, in my opinion, the offer was accepted much earlier than 1934. At the time the municipality ceased to tax the lane, it thereby evidenced its intention to accept the offer of dedication. If the assessment notices to the owner did not reveal that fact and constitute communication of the acceptance to the owner, then when the municipality began to expend public moneys on the land, to the knowledge of the owner, he certainly became aware of such acceptance, and that was as early as 1918. But it was argued that the mere sprinkling of the lane—whether with water or with oil—might well have been regarded by the owner as a

mere courteous act on the part of the municipality, and did not imply that it was thereby assuming liability for the lane. Even if that argument is to be accepted, the same cannot be said for the extensive work that was done in the year 1930, and in certain succeeding years up to and including the summer of 1934, and in later years to 1940. For myself, I can see no escape from the conclusion that if the offer to dedicate was not accepted and notice of such acceptance was not communicated to the owner prior to the summer of 1930, then at the very latest it was accepted and notice of acceptance was given to Hurst Sr. in the summer of 1930. The work done by the municipality was not a trespass, and no person in his senses would attribute the work done, commencing in 1930, as being a mere courtesy.

Certainly the late Mr. Hurst would be estopped from denying that the lane had been taken over as a thoroughfare by the municipality, and the plaintiff has no higher right than her predecessor in title. There is this fact in addition operating against the plaintiff, *viz.*, that she saw the work being done by the municipality and took advantage of it. She would still take advantage of it to the extent that it improved the entrance to her garage on lot 5, and to her barn on lot 6, but would deny advantage to the public whose money was used for those improvements. That she will not be permitted to do.

Before parting with this case I refer again to the question whether or not the lane was assessed for general rates from 1930—that being the year when the extensive work commenced—to 1934, when a mortgage was first registered against lot 6. I have earlier said that it would not be a rash assumption that it was not so assessed. I am prepared to put it even more strongly, and hold that, in the circumstances of this case, the onus of proving that it was so assessed, and general rates were paid, rested on the plaintiff, and that she has not discharged that onus.

I would allow the appeal and direct that judgment be entered dismissing the action and declaring that the land, consisting of the southerly 9.7 feet of said lot 6 from Norfolk Street to Bank Street, is a public thoroughfare, and directing the plaintiff, at her own expense, to remove all obstructions therefrom. The defendant counterclaimed for damages. The plaintiff will suffer substantially in costs, and, exercising my discretion, I would not

allow damages against her. The appellant shall have its costs of the action, not including the counterclaim, and shall have its costs of this appeal, to be taxed.

Appeal allowed with costs.

Solicitors for the plaintiff, respondent: Winter & Winter, Simcoe.

Solicitor for the defendant, appellant: W. P. Mackay, Simcoe.

[COURT OF APPEAL.]

**The City of Toronto v. The Governors of the University of
Toronto et al.**

Taxation—Municipal Real Property Assessment—Exemptions—Property Rented to University—Independent Club Permitted to Use Part—Whether “actually used and occupied” by University—The Assessment Act, R.S.O. 1937, c. 272, s. 4(3), (10)—The University Act, R.S.O. 1937, c. 372, s. 15(1).

The University of Toronto rented a building from the owner, and, since it did not at that time require the whole of the building for its own purposes, it gave permission to a club (not connected in any way with the university), to use “until further notice . . . available portions . . . at such times as we are not using all of the premises”.

Held, the building was exempt from taxation under s. 4(3) of The Assessment Act, since it must be found on the evidence, as a fact, that it was *bona fide* used in connection with and for the purposes of the university, and was actually used and occupied by the university, and not otherwise occupied.

Per HENDERSON and LAIDLAW JJ.A: The University of Toronto is not a charitable institution within the meaning of s. 4(10) of The Assessment Act.

AN APPEAL by the City of Toronto from a decision of the Ontario Municipal Board. The facts, and the decisions below, are fully stated in the reasons for judgment.

28th, 29th and 30th January 1946. The appeal was heard by HENDERSON, LAIDLAW and HOGG JJ.A.

Hamilton Cassels, K.C., for the respondents, took a preliminary objection that there was no right of appeal, the question at issue being one of fact only. [THE COURT directed counsel to proceed with the argument, being of the opinion that this question could not be determined until after the argument.]

J. Palmer Kent, K.C., for the appellant: The Municipal Board erred in its interpretation of The University Act, R.S.O. 1937, c. 372, s. 15, and of The Assessment Act, R.S.O. 1937, c. 272, particularly s. 4(3). [HENDERSON J.A.: The question before us is whether,

when the owner of a building gives a lease of it to a tenant who is exempt from taxation, the owner can still be assessed. Do you say that the partial occupation by persons other than the university entitles you to assess the building?] This building is vested in a subsidiary of The T. Eaton Company Limited, and used continuously by the Eaton company for purposes of recreation. That company is in actual occupation, and has the predominant use, and is within the definition of "tenant" in s. 1(o) of The Assessment Act. Separate assessments of parts of the building occupied by different persons are required under s. 23(1) (e). This Court has power, under ss. 86 and 87, to correct the assessment: *McLeod v. The City of Windsor*, [1923] S.C.R. 696, [1929] 3 D.L.R. 550.

Section 15 of The University Act does not apply to exempt this property. The land is not "vested" in the university, but in Business Properties Limited. The lease does not give an exclusive right to possession, and is not a vesting of any interest in lands. [LAIDLAW J.A.: Surely a lessee gets a property interest in the land; there can be a vested interest amounting to a leasehold estate.] The intention of s. 15 is to exempt only lands owned by the university. In any event, the section could not exempt any more than the university's interest in the property, which has been valued at about \$3,500: *McPhedran and Cleland v. City of Toronto*, [1932] O.R. 198, [1932] 2 D.L.R. 202. If the university, as we contend, is a mere licensee, it has no interest in the land, and there is no exemption: *Marshall v. Industrial Exhibition Association of Toronto* (1901), 1 O.L.R. 319, affirmed 2 O.L.R. 62; *Just v. Stewart* (1913), 23 Man. R. 517, 24 W.L.R. 433, 12 D.L.R. 65.

The property should be assessed to Business Properties Limited as owner. There is no provision in any statute giving it exemption: The Assessment Act, s. 36(1), (3). That respondent is also in constant occupation through its caretaker. The only interest for which the university could possibly claim exemption is the interest retained by it after its letter giving permission for use by the Eaton Girl's Club: *Re Hydro-Electric Power Commission of Ontario and Townships of Thorold and Pelham* (1924), 55 O.L.R. 431. The university is an occupant, but there is no reason why two occupants cannot be assessed.

The university is not entitled to claim exemption under s. 4(3) of The Assessment Act, which exempts only lands owned by

a university and not occupied by any other person. The evidence here clearly establishes that the premises in question are otherwise occupied: *City of Ottawa v. Ottawa Public School Board* (1923), 54 O.L.R. 414, varied 54 O.L.R. 633; *The Evangelical Lutheran Synod of Missouri, etc. v. The City of Edmonton*, [1934] S.C.R. 280 at 284, [1934] 2 D.L.R. 513. There is full use and occupancy by the club; the university does not occupy these premises. Although there is a lease, the actual facts show only a licence or right to occupy in part, and there is no exemption.

Occupants may be assessed, as well as owners: *Re Marley & Sandwich* (1932), 41 O.W.N. 178; *Re W. C. Edwards & Co. Ltd. and City of Ottawa* (1924), 26 O.W.N. 320.

The university cannot claim exemption under s. 4(10) as a charitable institution, because it is not a charitable institution, and also because the exemption of a university is separately dealt with in another subsection. In addition, the words "other charitable institution" must be construed according to the *ejusdem generis* rule: *Canadian National Railways v. Town of Capreol*, [1925] S.C.R. 499, [1925] 3 D.L.R. 810. The basis of exemption is quite different under the two subsections: a charitable institution does not need to own lands, but a university is exempted only as to lands owned by it.

Even if the university should be held to be exempt, there is nothing in the statute to exempt the other respondents: *Parkinson v. Potter* (1885), 16 Q.B.D. 152; *City of Vancouver v. The Attorney-General of Canada et al.*, [1944] S.C.R. 23, [1944] 1 D.L.R. 497.

Exemptions from taxation must be strictly construed; immunity from taxation will not be recognized unless it is granted in terms too plain to be mistaken: *Kennedy v. The Minister of National Revenue*, [1929] Ex. C.R. 36. The general rule is that property is taxable, and an exemption clause to fit any particular case must be found within the four corners of the statute in question: *In re McMaster Estate Assessment* (1901), 2 O.L.R. 474; Cooley on Taxation, 2nd ed. 1886, p. 205. The premises here should be assessed against Business Properties Limited as owner and against the university and The T. Eaton Company Limited as occupants. In the alternative, the university should be declared exempt only as to its interest in the property, valued at \$3,500.

Hamilton Cassels, K.C., for the The Governors of the University of Toronto, respondent: The university is exempt under s.

4(10) of The University Act as a charitable institution within the accepted definition as given in *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 at 583. This definition has been adopted in The Mortmain and Charitable Uses Act, R.S.O. 1937, c. 147, s. 1(2). That this exemption applies to such an institution as lessee and not merely as owner is established in *Becker et al. v. City of Toronto*, [1933] O.R. 843, [1933] 4 D.L.R. 736. I refer also to *Re The Town of Walkerville and Walker*, [1935] O.W.N. 168. We are not to be excluded from the operation of s. 4(10) by the application of the *ejusdem generis* rule: *In re The Township of King and The Marylake Agricultural etc. Association*, [1939] O.R. 13, [1939] 1 D.L.R. 263.

Apart from s. 4(10), the property is clearly exempt under s. 4(3), and under the combined effect of ss. 1(f) and 15(1) of The University Act.

J. D. Arnup, for Business Properties Limited and The T. Eaton Company Limited, respondents: The property is exempt from all taxation under s. 4(3) of The Assessment Act. Whether or not a person is an occupier is a question of fact: *The Assessment Committee of the Holywell Union et al. v. The Halkyn District Mines Drainage Company*, [1895] A.C. 117 at 125, 127; *Borwick v. Southwark Corporation*, [1909] 1 K.B. 78 at 84. There is consequently no right of appeal to this Court, since an appeal lies only on questions of law: *Re International Metal Industries Ltd. and the City of Toronto*, [1940] O.R. 271, [1940] 3 D.L.R. 50; *The City of Toronto v. Famous Players' Canadian Corporation Limited*, [1936] S.C.R. 141, [1936] 2 D.L.R. 129, affirming [1935] O.R. 314, [1935] 3 D.L.R. 327.

The Eaton Girls' Club is not a "tenant" of the premises unless it is an "occupant": The Assessment Act, s. 1(o); the order in appeal finds that it is not an occupant, and this finding is not appealable.

Occupation connotes actual possession, together with the power to control the premises: *Reg. v. The Assessment Committee of St. Pancras* (1877), 2 Q.B.D. 581 at 588. The factor of control is an important matter for consideration: the *Holywell Union* case, *supra*, at pp. 124-6, 130, 131, 133, 134; *Meigh v. Wickenden*, [1942] 2 K.B. 160. I refer also to *Re City of Ottawa and Grey Nuns* (1913), 29 O.L.R. 568, 15 D.L.R. 725; *Ottawa Young Men's Christian Association v. City of Ottawa* (1913), 29 O.L.R. 574 at 580, 15 D.L.R. 718.

The university is in occupation and there is no other occupant. The Eaton Girls' Club has neither legal possession nor the power to control the premises. Both essential elements of legal occupation are absent.

There is no authority for the principle put forward that the respective interests of the university and the owner should be separately valued, and that only the university's interest should be exempt. It is the land which is exempt, if occupied by the university, and not simply the university's interest in the land: *Becker et al. v. City of Toronto, supra*; cf. *Re The Town of Walkerville and Walker, supra*.

J. Palmer Kent, K.C., in reply: Under s. 15 of The University Act, it is only the university's interest in the property that is exempt. This Court has power to re-open the whole assessment.

Cur. adv. vult.

20th February 1946. HENDERSON J.A., agrees with LAIDLAW J.A.

LAIDLAW J.A.:—The Corporation of the City of Toronto (hereinafter for convenience called "the City") appeals from a decision of the Ontario Municipal Board dated the 18th day of September 1945, that a certain part of premises known as 415 Yonge Street, Toronto, and separately assessed for municipal purposes, is not liable to taxation. The notice of assessment made in the year 1944, showing the amount on which taxes for the year 1945 would be levied, showed the tenant to be "Board of Governors, University of Toronto", and the owner "Business Properties Limited". The tenant appealed to the Court of Revision, and the appeal was dismissed. On further appeal to His Honour Judge Barton, County Judge, it was decided that the Board of Governors of the University (hereinafter called "the Board") and the Eaton Girls' Club each have approximately equal use of the assessed premises; that the interest of the Board is not taxable; and that the Eaton Girls' Club should be assessed 50 per cent. of the assessed value. The City thereupon appealed to the Ontario Municipal Board, and joined Business Properties Limited as a party to the proceedings. The Ontario Municipal Board dismissed the appeal and further ordered "that the order of His Honour Judge Barton be amended by striking out the part therein which declares that The Eaton Girls' Club should be assessed 50 per cent. of the assessed value

of such assessed premises." Thereupon the City appealed to this Court, and gave notice of appeal to the Board, to Business Properties Limited and also to The T. Eaton Company Limited.

Business Properties Limited is a subsidiary company of The T. Eaton Company Limited, and is the owner of the lands and premises in question. There is a building on the land, and certain portions of it, used as an auditorium and broadcasting station, two retail stores, and a caretaker's apartment, are assessed separately from the remaining portion, the assessment of which is alone in question.

By an indenture made on the 1st day of July 1941, in pursuance of The Short Forms of Leases Act, R.S.O. 1937, c. 159, Business Properties Limited demised and leased the premises in question to the Board "to have and to hold" for a term of five years. By a letter dated 5th July 1941 the Bursar and Secretary of the Board gave the Eaton Girls' Club permission to use available portions of the premises at such times as the Board was not using them for the purposes of the physical and health education department of the university. The Board established a school of physical and health education and used the necessary space in the premises for that purpose. Members of the Eaton Girls' Club, and at times other persons connected with The T. Eaton Company Limited, also used various parts of the building when they were not in use by the Board for the purposes of the university.

The respondents claim that the assessed premises are exempt from taxation under the provisions contained in s. 4(3) of The Assessment Act, R.S.O. 1937, c. 272. The Board claims exemption also under s. 4(10) of The Assessment Act, and in any event under s. 15(1) of The University Act, R.S.O. 1937, c. 372.

I quote s. 4 of The Assessment Act, in part, as follows:

"All real property in Ontario . . . shall be liable to taxation, subject to the following exemptions:

"3. The buildings and grounds of and attached to or otherwise *bona fide* used in connection with and for the purposes of a university . . . so long as such buildings and grounds are actually used and occupied by such institution, but not if otherwise occupied."

It is contended on behalf of the City that s. 4(3) is limited in its application to buildings and grounds owned by a university, and that the words therein "buildings and grounds of" govern the following words of the paragraph. I do not accept that con-

struction of the subsection. In my opinion it extends to and includes buildings and grounds *bona fide* used in connection with and for the purposes of a university, even though the university is not the owner of them. The essential elements giving rise to the exemption are actual use and occupation by the institution in connection with and for the purposes of a university. Moreover, the subsection is not confined in its application to any particular interest or estate in the buildings and grounds falling within the provision.

The whole estate and interest in such buildings and grounds is exempt from taxation. The fact that more than one person has a separate estate or interest therein does not take the premises out of the subsection, or make any such separate estate or interest liable to taxation. But the period of exemption is limited. It continues only "so long as such buildings and grounds are actually used and occupied by such institution". If the actual use ceases, so, too, does the period of exemption. Likewise, if the occupation by the institution ends, the period of exemption is terminated. Both actual use and occupation by the institution must co-exist, otherwise the buildings and grounds are liable to taxation.

Counsel for the City stresses the fact that a large part of the assessed premises is actually used at times for purposes other than those of a university and by persons other than the Board. In particular, much emphasis is put upon the use made of parts of the assessed premises by members of the Eaton Girls' Club. The membership of that club is made up of such employees of The T. Eaton Company Limited as may choose to become members, upon payment by them of fees, and also of a limited number of persons who are not so employed. The use made by them of the premises is not in any way connected with or for the purposes of a university. It may be, too, that the number of such members who actually use the premises is greater than the number of university students who do so, and that a larger part of the space is used by them than is used by the Board. But the use of a portion—even the larger portion—of the premises for purposes other than those of a university does not necessarily preclude a finding that the building is actually used by such institution within the meaning and intent of the legislation. I do not read the words in the subsection, "so long as such buildings

and grounds are actually used and occupied by such institution, but not if otherwise occupied", to mean "so long as *every part* of such building and grounds is used and occupied by such institution, but not if otherwise occupied *or used in part*". If such a meaning had been intended, appropriate language would no doubt have been used to make that meaning plain.

It is to be next noted that the use of the premises by the Eaton Girls' Club and others is confined to times when they are not required by the Board for the purposes of a university. There is no such user at any time which in any way interferes with the full use and enjoyment by the Board. One must look at all the circumstances and conditions under which the assessed premises are used, and decide from the evidence whether it can reasonably be found therefrom as a fact that the building in question is actually used by the university, and in so doing one must not confuse the use of part or parts of the building with the use of the building as a whole. I reach the conclusion in this case that the building is actually used by the Board for the purposes of the university, notwithstanding the use, as described, by other persons.

Counsel for the City urges strongly that it ought to be found from the evidence in this case that the building was not "occupied" by the Board, but, on the contrary, was otherwise occupied, and that in consequence there is no exemption under s. 4(3) of The Assessment Act. It has been said that "The question whether a person is an occupier or not within the rating law is a question of fact": *The Assessment Committee of the Holywell Union et al. v. The Halkyn District Mines Drainage Company*, [1895] A.C. 117 at 125. *Liverpool Corporation v. Chorley Union Assessment Committee et al.*, [1911] 1 K.B. 1057 at 1071; affirmed [1912] 1 K.B. 271; [1913] A.C. 197. But the elements which constitute occupation within the meaning of rating law have been the subject of much consideration and authority.

Two principles at least can be deduced from the cases: (1) occupation depends on the right of regulation and control of the premises in question; and (2) it does not depend on legal title. I shall first discuss the element of control and regulation of the premises. In the *Holywell Union* case, *supra*, Lord Davey, at p. 134, says:

"The cases shew that if a person has only a subordinate occupation subject at all times to the control and regulation of

another then that person has not occupation in the strict sense for the purposes of rating, but the rateable occupation remains in the other, who has the right of regulation and control."

In *Mayor, etc. of The City of Westminster v. The Southern Railway Company et al.*, [1936] A.C. 511 at 529, Lord Russell of Killowen says: " . . . in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact—namely, whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in respect of the premises in question, and in regard to the purpose of the occupation of those premises."

At p. 530, he says: "The general principle applicable to the cases where persons occupy parts of a larger hereditament seems to be that if the owner of the hereditament (being also in occupation by himself or his servants) retains to himself general control over the occupied parts, the owner will be treated as being in rateable occupation; if he retains to himself no control, the occupiers of the various parts will be treated as in rateable occupation of those parts."

And at p. 532 he says: "In truth the effect of the alleged control upon the question of rateable occupation must depend upon the facts in every case; and in my opinion in each case the degree of the control must be examined, and the examination must be directed to the extent to which its exercise would interfere with the enjoyment by the occupant of the premises in his possession for the purposes for which he occupies them, or would be inconsistent with his enjoyment of them to the substantial exclusion of all other persons."

Occupancy does not depend upon legal title. In the *City of Westminster* case, *supra*, Lord Russell of Killowen, at p. 532, says:

"There can I think be no doubt that a view once prevailed that in order to constitute rateable occupation it was necessary that the occupier should be in the position of a tenant of the land; and that a mere licence to occupy, or a title to occupation in virtue of a right in the nature of an easement was not enough." But he further says, at p. 533:

"In my opinion the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement."

I proceed to consider what degree of right each party had in the assessed premises. I first examine the provisions of the lease dated 1st July 1941, to ascertain what rights touching the question were thereby acquired by the Board. The assessed premises were demised and leased to the Board "to have and to hold" during the term of the lease. The Board, as lessee, covenanted with the owner "not to . . . permit . . . anything to be done on the said premises which may be annoying . . . subsequent to the occupancy of the demised premises by the Lessee"; and to indemnify the owner from any loss "arising out of or in connection with or by reason of the occupation". The owner covenanted with the Board "for quiet enjoyment". Amongst other things it was also understood and agreed between the parties "that the Janitor from time to time of the demised premises shall have the right of access at all times from and to his said apartment on the 3rd floor through the entrances and exits and over the halls and stairways of the demised premises leading to said apartment"; also the owner was given the right during the term of the lease to place upon the demised premises notice that the premises were for sale and/or to let. While the lease makes provision for certain rights of the owner, nevertheless it is quite plain that the Board acquired not only legal possession of the premises, but all rights of control and regulation thereof necessary for the full enjoyment and use of the building for its purposes during the term of the lease.

The question then arises: Has the Board parted with or lost the right of control and regulation of the building acquired by it? What degree of control or regulation did it give to the Eaton Girls' Club or The T. Eaton Company Limited? The exact language of the letter dated 5th July 1941 from the Bursar and Secretary of the Board to the Eaton Girls' Club is of much importance in considering this question, and I reproduce it, in part, as follows:

"You are at liberty until further notice to use for the purpose of your Club, available portions of our premises . . . at such times as we are not using all of the premises for the purpose of

the Physical and Health Education Department of the University”

The language of the letter, as quoted above, makes it abundantly plain that the Eaton Girls' Club were given “the liberty” to use available portions of the assessed premises at times only when they were not required by the Board for its purposes and only until further notice from the Board. There was no right of any extent or kind conferred on the grantee to choose or control either the space it desired or the time to enjoy the use of it. On the contrary, the full right and power to regulate and control the use of the premises remained in the Board. Nor did the Board lose such right by the manner and times of use by the Eaton Girls' Club, or others. There is no evidence that there was interference at any time with the use of the building by the Board to the full extent of its requirements, and there was no evidence that the right of user of any other person concerned was paramount to that of the Board. If the proposed use by any such person of any part of the building at any time conflicted with the desired use by the Board, it would have to give way and would be subordinate to the rights of the Board. A system of booking the use of the premises was maintained by a person in charge of the recreation department of The T. Eaton Company Limited, but that fact did not in any way give him a right or power superior to that of the Board in the matter of regulation and control of the building and did not to any extent lessen the Board's right. It was no more than a method adopted for their own convenience by persons possessing a right of enjoyment only of the premises. I find on the evidence that all rights of persons other than the Board to possession, enjoyment, use and occupation of the assessed premises were subordinate to those of the Board.

Counsel for the City then contends that Business Properties Limited was the occupant, and relies on the fact that a janitor employed by it resided on the premises and performed the usual services thereon. But it will be observed at once that the right of access of the janitor over the demised premises to his apartment was expressly granted by the Board in the lease made with Business Properties Limited. In the absence of such grant the janitor had no right to access over the demised premises, and Business Properties Limited did not thereby acquire any right of control or regulation of the building. I conclude therefore, and

find on the evidence as a fact, that the building in question was in actual use and occupation by the Board in connection with and for the purposes of a university, and was not otherwise occupied. This same finding was made by the Ontario Municipal Board, and it becomes unnecessary for me to decide whether this Court has any power, on appeal to it, to alter or reverse a finding of fact so made.

I do not discuss at length the contention of counsel for the Board that it is not liable to taxation by reason of s. 4(10) of The Assessment Act. It is sufficient simply to mention my view that the Board is not a "charitable institution" within the meaning and intention of that subsection.

Finally, it was argued that the Board is exempt from taxes under s. 15(1) of The University Act, R.S.O. 1937, c. 372. That section is, in part, as follows: "The property real and personal vested in the Board shall not be liable to taxation . . . and shall be exempt from every description of taxation".

"Real property", as defined by The University Act, s. 1(f), includes "tenements and hereditaments whether corporeal or incorporeal. . . and any estate or interest therein."

It is my opinion that, by virtue of s. 15(1), and by applying to it the statutory definition quoted from s. 1(f), the exemption therein provided extends only to the leasehold interest in the premises. A comparison might be noted between the provisions of this section, which, in my view, exempts from taxation only a specified interest in land, and the provisions of s. 4(3) of The Assessment Act, *supra*, which is unlimited and exempts the whole estate and interest in the buildings and grounds to which it applies.

For the reasons stated I would dismiss the appeal with costs.

HOGG J.A.:—I have had the privilege of reading the reasons for judgment of Mr. Justice Laidlaw, and I concur in the conclusion reached by him.

The interpretation to be placed on the words "actually used", forming part of the phrase "actually used and occupied" in s. 4(3) of The Assessment Act, seems to present certain difficulties not present in arriving at the meaning of the word "occupied", and, as Mr. Justice Laidlaw has put it, both actual use and occupation by the institution must co-exist, otherwise the buildings and grounds are liable to taxation.

Emphasis is placed upon the extent, and the nature or character, of the use, by the presence of the word “actually”, and this word eliminates any idea of constructive use. It is a fact that a portion of the building in question is actually used for a considerable part of the time by persons who are not the agents of, or connected with, the university in any manner, except that they are in the building with the permission of the university, and the question arises as to the degree or the extent of the use on the part of the university necessary, in relation to the whole of the building, to bring such use within the ambit of the limitation proviso of the section. Section 4 of the Act makes all real property in Ontario liable to taxation subject to certain exemptions. In dealing with statutes which impose upon, or render property or persons liable to assessment and taxation, it might be appropriate to recall the words of Lord Halsbury in the often-cited case of *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, where he said that “There is no purpose in a Taxing Act but to raise money, and an exemption is just as much within this criticism as any other part of the Act, since every exemption throws an additional burden on the rest of the community.” It has been said that the words of a statute conferring exemption from taxes are to be construed strictly: *Commissioners of Taxation v. Trustees of St. Mark’s Glebe*, [1902] A.C. 416, in the Privy Council. No doubt clear words are necessary to give immunity from a tax, but that does not signify that the meaning of the statute is to be strained.

The solution of the problem of determining the meaning of the words “actually used” is to be found, I think, in the reasons for judgment of Meredith C.J.O., in *Re City of Ottawa and Grey Nuns* (1913), 29 O.L.R. 568, 15 D.L.R. 725. At the time this judgment was delivered subs. 3a of s. 5 of The Assessment Act, 1904, c. 23, as enacted by 1910, c. 88, s. 1(2), was under consideration. This subsection was—with certain differences which do not affect the matter in question—similar to the present subs. 3 of s. 4 of The Assessment Act, and contained the same phrase, “actually used and occupied”. The Chief Justice said, at p. 573:

“The only question as to which a doubt might arise is as to the boarding of the pupils attending the schools which are carried on in the convent building. That is but a very small part of the work of the community, and, for the purposes of par. 9 of sec. 5 is, I think, immaterial, as the dominant or principal use of the

building is for charitable purposes. The carrying on of that part of the work of the community may be in itself charitable; but, if not, the fact that it is carried on cannot deprive the institution of its character of a charitable institution conducted on philanthropic principles, and not for the purpose of profit or gain. As was said in *Salem Lyceum v. City of Salem* (1891), 154 Mass. 15, 17: 'If the principal occupation is . . . for those purposes' (i.e., for the purposes for which the plaintiff was incorporated), 'occasional and incidental use for other purposes might not render it liable to taxation.' This statement was quoted with approval by Morton, J., in delivering the judgment of the Supreme Judicial Court of Massachusetts, *Phillips Academy Trustees v. Inhabitants of Andover* (1900), 175 Mass. 118, at p. 126, who spoke of it as 'recognising that it is or may be the dominant purpose which gives character to the occupation;' and in that view I agree."

The dominant or principal use of the building which is concerned in this appeal is for the purposes carried on by the university in such building. The use made of part of the building by others does not detract from the paramount use by the university for its own purposes.

In *Commissioners of Taxation v. Trustees of St. Mark's Glebe*, *supra*, the words "lands occupied or used exclusively for or in connection with" public charitable purposes or a church, as they appeared in the exemption provision of an Australian taxing Act, were the subject of interpretation by the Judicial Committee. This judgment, however, cannot be applied to the present case for the reason that the facts are dissimilar. A part of the lands was demised on building leases and the balance was not physically occupied or used for any purpose. In the case at bar, the university has so limited the use by others of part of the building that it can make use of the whole of such building whenever it sees fit to do so.

Appeal dismissed with costs.

Solicitor for the City of Toronto, appellant: W. G. Angus
Toronto.

Solicitors for The Governors of the University of Toronto,
respondent: Cassels, Brock & Kelley, *Toronto.*

Solicitors for Business Properties Limited and The T. Eaton Company Limited, respondents: Mason, Foulds, Davidson & Gale,
Toronto.

[COURT OF APPEAL.]

Re Pszon.

Bankruptcy—Persons Exempt from Compulsory Bankruptcy—Wage-earners—Ownership of One Rented House—Special Circumstances—Whether Debtor “carrying on business”—The Bankruptcy Act, R.S.C. 1927, c. 11, ss. 2(II), 7.

P, who was employed at a salary rate less than \$1,500 per year, bought a house, intending to occupy it himself. The house was then occupied by tenants, and P took proceedings to get rid of one of them, but was unsuccessful. He undertook certain repairs and improvements in the expectation of occupying the property himself, rather than for the advantage of the tenants.

Held, the ownership of this house, and the receipt of rent therefor, did not constitute “carrying on business” so as to remove P from the definition of a “wage-earner” in s. 2(II) of The Bankruptcy Act. Nor did the repair and improvement of the property, in the circumstances here present, have that effect. P was accordingly not subject to Part I of the Act, by reason of the provisions of s. 7.

Per LAIDLAW J.A.: The word “business” is of wider import than “trade”. *In re a Debtor*, [1927] 1 Ch. 97 at 105, referred to. As used in various statutes, it involves at least three elements: (1) the occupation of time, attention and labour; (2) the incurring of liabilities to other persons; and (3) the purpose of gaining a livelihood or profit. Judgment of Urquhart J., [1945] O.W.N. 847, reversed.

AN APPEAL by the debtor from the order of Urquhart J., [1945] O.W.N. 847, 27 C.B.R. 54, [1946] 1 D.L.R. 262, adjudging him a bankrupt.

28th January 1946. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and LAIDLAW JJ.A.

Frederick H. Ganz, for the debtor, appellant: The trial judge should have found that the appellant was a wage-earner within the meaning of s. 2(II) of The Bankruptcy Act, R.S.C. 1927, c. 11, and that Part I of the Act was therefore not applicable, by virtue of s. 7. Even if the Act does apply, the trial judge should have exercised his discretion by dismissing the petition. There were other means, equally effective, of enforcing the respondent’s judgment: *Re Wells*, [1944] O.W.N. 428, 25 C.B.R. 291, [1944] 3 D.L.R. 651; *Re Benson*, [1937] O.W.N. 1, 18 C.B.R. 99. The onus is not upon us to show that we are not within the Act, but upon the petitioning creditor to show that we are not exempt: *In re Dubrofsky and The Viger Company Limited* (1933), 15 C.B.R. 230; *In re Nerlich*; *Ex parte Western Canada Flour Mills Limited* (1931), 40 O.W.N. 241, 12 C.B.R. 383; *Ex parte Salaman*; *In re Taylor* (1882), 21 Ch. D. 394; *First Nat. Bank of Bode, Idaho v. Williams* (1929), 31 Fed. (2d) 749.

The respondent is attempting to use the bankruptcy court as a collection agency, which should not be permitted: *Re Montreal Alberta Petroleums Ltd.*, [1939] O.W.N. 20, 20 C.B.R. 135.

The case turns entirely on the question whether the appellant was carrying on business. As a wage-earner he is clearly not subject to the compulsory provisions of the Act: *In re James* (1931), 13 C.B.R. 247 at 251. Our submission is that the facts do not constitute carrying on business, and we rely on such cases as *In re Parkinson; Ex parte Plant* (1893), 9 T.L.R. 388; *Smith v. Anderson* (1880), 15 Ch. D. 247 at 260; *Setter et al. v. Wilson* (1934), 37 Pac. (2d) 50; *Ex parte Stewart; In re Stewart* (1849), 3 DeG. & Sm. 557, 64 E.R. 604.

Lewis Duncan, K.C., for the petitioning creditor, respondent: The appellant does not come within the exception of ss. 2(II) and 7 of The Bankruptcy Act. In the period relevant to these proceedings, he was not a wage-earner at all, but was employing workmen and financing them. He incurred liabilities, as an ordinary citizen, which were not paid at the time of the bankruptcy proceedings. The onus is upon the appellant to prove that he is a wage-earner, and is not within the exception of s. 2(II). He must show that he is not engaged in any other activity: *Duncan and Reilley, Bankruptcy Law in Canada*, 2nd ed. 1933, p. 2; *In re Dagnall; Ex parte Soan and Morley*, [1896] 2 Q.B. 407.

The appellant was carrying on business within the cases; he was renting flats for gain. If a name could be given to this business it would be called "the business of a landlord". He obligated himself to other persons and borrowed money to finance these activities. This is not the case of a wage-earner owning a single piece of property. I rely on *Smith v. Anderson* (1880), 15 Ch. D. 247 at 258, 278; *The Rideau Club v. The City of Ottawa* (1907), 15 O.L.R. 118 at 124, 127; *Re The City of Toronto and Frankland et al.*, [1939] O.R. 357, [1939] 3 D.L.R. 262; *In re Parkinson; Ex parte Plant, supra; In re Harrison; Ex parte The Official Receiver* (1892), 10 Morr. 1.

This was a speculative business operation. The appellant incurred debts while he was not a wage-earner: *In re Dubrofsky and The Viger Company Limited, supra*.

Frederick H. Ganz, in reply.

13th March 1946. ROBERTSON C.J.O.:—The question in dispute here is whether the debtor came within the definition of a “wage-earner” to be found in s. 2(II) of The Bankruptcy Act, R.S.C. 1927, c. 11. He did not have wages, salary, commission or hire at a rate exceeding \$1,500 a year. It is contended, however, and the finding of Urquhart J. is, that “on his own account he carries on business”.

For five years the debtor has been employed as an inspector and salesman for Silverwood Dairies. That is how he has earned his living. In September 1943 he became the owner of a house, no. 49 Lakeview Avenue. That is the only real property he owns, and it is mortgaged. The debtor acquired the property intending to occupy it himself. There were tenants in occupation at the time, of whom the petitioning creditor was one, and although the debtor took steps to get rid of one of them, his efforts were not successful. In the meantime he undertook certain repairs and improvements to the property in expectation of becoming himself an occupant, rather than for the advantage of the tenants in occupation, of whom he is, for the present, unable to get rid because of the rental controls presently in effect.

The learned judge considered that the debtor's dealings and activities in having tenants who paid him rent and in repairing and improving his property, constituted the carrying on of business on his own account. I am unable to accept that view in the circumstances of this case. It is true that the debtor is unwillingly in the position of having occupants of his property who pay him rent, and whom he has, so far, been unable to get rid of. I do not think that it can be said, however, that he carries on the business of a landlord. His property, which he bought in the expectation of living in it as his home, is, unfortunately, encumbered with tenancies that so far he has not been able to terminate. His temporary position as a landlord is one that is forced upon him against his will and contrary to his expectations. He is a purchaser of residence property which he bought for his own occupation, but who has to put up with its occupation for a time by tenants who were already in possession. I do not think he can be said to have carried on business as a landlord, in such circumstances.

Neither do I think that the repair and improvement of his property, by his own work and with materials he had purchased,

amounts to carrying on business. The debtor was doing this work on the house with a view to his own occupation of it, and not for the benefit of the then occupants. So much was this the case that the petitioning creditor sued him for the disturbance of his occupation of the premises as a tenant, and recovered a judgment for damages. It is that judgment that gives the petitioning creditor his status in these proceedings. Essentially the case does not differ from the case of a wage-earner who makes repairs and improvements to the house he owns and occupies, when viewed from the standpoint of determining whether or not the owner is carrying on a business when he improves his own property.

In my opinion the appellant as a wage-earner was not subject to the provisions of The Bankruptcy Act, under which these proceedings were taken, and his appeal should be allowed, with costs, including the costs of the proceedings below.

HENDERSON J.A. agrees with ROBERTSON C.J.O.

LAILAW J.A.:—The debtor appeals from an order of Urquhart J., dated the 3rd day of November 1945, that he be adjudged bankrupt and that a receiving order be made against him.

The appellant resides at 57 Givens Street, Toronto. For some years he had been employed as a salesman and inspector by Silverwood Dairies Limited, and the learned judge found on the evidence that he was a wage-earner at a gross salary (before any deductions) in 1945 of slightly less than \$1,500 annually, and that this was his highest rate of remuneration as such at any time during the last three years. But he found also that the appellant was carrying on business on his own account and in consequence was not within the exception contained in s. 7 of The Bankruptcy Act.

In September 1943 the appellant purchased premises known as 49 Lakeview Avenue, Toronto. The building on the land was an old detached single dwelling house of two floors. At the time of the purchase the lower floor was occupied as a place of residence by Jack Sedore, the respondent, and the upper floor was occupied for the same purpose by another tenant. After the appellant became the owner of the premises both tenants continued in possession. The total purchase price of the property was \$3,750, of which the sum of \$750 was paid in cash and the balance of \$3,000 was secured by a mortgage from the pur-

chaser to the vendor. The tenant of the upper floor paid rent at the rate of \$33 per month and the respondent paid \$28 per month. The learned judge found that the respondent was allowed "a discount of \$5 per month because he attended to the furnace, shovelled snow, etc.", and that the appellant was under an obligation to heat the house for his tenants.

In 1944 the appellant made certain structural alterations to the house. In the course of that work he tore out a side wall and chimney, and caused the respondent and his family discomfort, loss and damage. The respondent brought an action against the appellant for damages suffered by reason of interference with his rights as a tenant. He recovered judgment on the 8th March 1945, for \$498.85 as damages and for costs subsequently taxed in the sum of \$257.40, making a total of \$756.25. On the 11th July 1945 a writ of execution was issued to the Sheriff of the County of York, and the writ was returned *nulla bona*. On the 24th September 1945 the respondent petitioned for a receiving order. The petition shows, *inter alia*, that the appellant "during the six months next preceding the presentation of this petition carried on business", that he was then indebted to the respondent in the sum of \$664.97 made up of the sum of \$756.25 mentioned, together with interest from the date of judgment to the date of the petition (\$20.72), less "rents set-off and received" for the months of August and September amounting to \$112. The appellant gave notice of his intention to oppose being adjudged bankrupt and the making of a receiving order. The notice of the appellant as quoted in part is: "I intend to deny that I carried on business lately or at some time during the six months or other material time next preceding the presentation of the Petition: and that I intend to contend that the provisions of Part I of The Bankruptcy Act, R.S.C. 1927, Chapter 11, and amendments thereto do not apply to me as I am a wage-earner within the meaning of Section 2(II) of the said Act in that I work for wages, salary or hire at a rate of compensation not exceeding fifteen hundred dollars per year and that I do not on my own account carry on business."

It will be convenient to reproduce parts of certain sections of The Bankruptcy Act, R.S.C. 1927, c. 11, as follows:

"2. In this Act, unless the context otherwise requires or implies, the expression,— . . .

“(II) ‘wage-earner’ means one who works for wages, salary, commission or hire at a rate of compensation not exceeding fifteen hundred dollars per year, and who does not on his own account carry on business.”

“7. The provisions of this Part shall not apply to wage-earners”

By reason of the finding of fact of the learned judge that the appellant works for wages at a rate of compensation not exceeding \$1,500 per year, with which I agree, it is necessary only to consider and determine on the evidence whether he carries on business on his own account within the meaning and intention of The Bankruptcy Act. The question is one which in my opinion is essentially one of fact. I am not aided in my finding by assuming other facts and circumstances, and decided cases are helpful only in so far as they show what constitutes “carrying on business”. The word “business” is of wider import than “trade”: *In re a Debtor*, [1927] 1 Ch. 97 at 105. As used in various statutes it involves at least three elements: (1) the occupation of time, attention and labour; (2) the incurring of liabilities to other persons; and (3) the purpose of a livelihood or profit. A person who devotes no time or attention or labour, by himself or by servants or employees, to the working or conduct of the affairs of an enterprise does not carry on the business of such enterprise. He might, for instance, be only financially interested. But to carry on business he must give attentions, or perform labour, for the maintenance or furtherance of the undertaking, and devote time to the accomplishment of its objects. He must also be in such relation to the public that he may be held liable to others. The liabilities must be such as to be referable to the carrying on of the enterprise. Obligations assumed in connection with and for the purpose only of betterment of property owned by a man do not necessarily constitute him a person who carries on business. Finally, it is an essential element of carrying on business that the purpose of the engagement is for a livelihood or profit. If an enterprise is not conducted as a means to accomplish that object it does not come within the ordinary meaning of the term “business”.

Study of the evidence shows that in 1944 the appellant was not working at his usual employment at Silverwood Dairies Limited for a period of four and a half months. During that

period he worked for part of the time at least in making structural improvements to the house occupied by his tenants. He incurred liabilities in that connection and also by way of obligations to heat the premises. But I cannot think that the employment of his time, attention and labour under such circumstances could reasonably be considered as being in the course of business. It was no more or less than any owner might do to improve his property. Likewise the liabilities involved were not undertaken to carry on a business. They were merely incidental to the maintenance, betterment and use of the property in a private manner. But in any event it is plain to me that in this case the essential constituent of business in the trade or commercial use, namely, that the enterprise be conducted for the purpose of a livelihood or profit, is entirely lacking. The old house was purchased by the appellant as a place in which he intended to reside. He gave the respondent notice to vacate. He took proceedings to obtain possession of the premises occupied by the respondent, and did all he could in law to obtain the accommodation for his own use. It cannot be reasonably found on the evidence that he purchased the premises or conducted the operation of renting them as a means of livelihood. He did not spend his time, attention or labour on the property for that purpose. Again, he did not engage in the enterprise with a view to gain or profit from renting the premises. Indeed, I doubt if the premises would yield a profit from rentals. There is no evidence to support the calculation made by the learned judge or the conclusion reached therefrom by him that "the house would yield a slight surplus". It may be observed incidentally that he omitted in his assumptions an item for cost to the appellant of heating the premises, and the addition of that expense might have shown that the property was being carried at a loss to the appellant.

I conclude that the appellant did not on his own account carry on business, and that he was a wage-earner within the definition contained in s. 2(*ll*) of The Bankruptcy Act. By virtue of s. 7 of that statute the provisions of Part I thereof are not applicable to him. Therefore the order made by the learned judge in the court below ought to be set aside and in place thereof the application made on behalf of the respondent ought to be dismissed with costs. The appeal will accordingly be

allowed, the formal order of the Court to include such directions and provisions as may be usual or necessary for discharge of the custodian appointed by the order of Urquhart J.

The costs of this appeal ought to be paid by the respondent to the appellant forthwith after taxation.

Appeal allowed with costs.

Solicitor for the petitioning creditor, respondent: Lewis Duncan, Toronto.

Solicitor for the debtor, appellant: Frederick H. Ganz, Toronto.

[COURT OF APPEAL.]

Marks v. Hamilton Street Railway Company et al.

Street Railways—Negligence—Failure to Sound Warning—Whether Contributory Cause of Accident—Contributory Negligence—Meaning of Jury's Findings.

The plaintiff, while driving his automobile along a street in Hamilton in mid-afternoon, was struck by a street-car of the defendant company, at a place where the tracks crossed the road. The plaintiff's evidence was that he had looked along the tracks when he was about 75 feet away, had seen nothing, and had proceeded at from 10 to 12 miles per hour, without looking again until he was within some 10 feet, at which time he saw the street-car about 60 feet from him, approaching at a speed of from 30 to 35 miles per hour. He said he had then turned slightly (it being too late to stop before reaching the tracks) but had not succeeded in avoiding the collision. He swore that he had not heard any gong or other warning, and that he would have heard a warning had one been sounded. The jury found that the plaintiff had satisfied them that the loss and damage had not arisen through his negligence or improper conduct, and that the street-car operator had been negligent in failing to sound his gong and approaching a busy corner at a rush hour at an excessive speed, and without having his car under proper control. The defendants (the owner and the operator of the street-car) appealed.

Held, unanimously, the jury's finding with respect to the plaintiff's conduct was perverse and could not be supported on the evidence. There was clear evidence of negligence on his part, and the judgment must accordingly be set aside.

Held further (ROBERTSON C.J.O. dissenting), the finding of negligence against the defendants was also perverse, and not supported by the evidence, and the action should accordingly be dismissed.

Per Hogg J.A.: The jury's finding as to excessive speed and lack of proper control of the street-car was predicated upon the assumption that the accident happened at a busy corner at a rush hour, and the evidence was that, at the time of the accident, there was no other traffic on the street. As to the failure to sound the gong, this could not be considered as negligence causing or contributing to the accident, since the evidence was that the plaintiff had driven on to the crossing without looking to see whether a street-car was approaching, and there was no suggestion of any excuse for his failure to look, and his negligence must therefore be considered the sole cause of the accident; review of authorities.

AN APPEAL by the defendants from the judgment of Lazier Co. Ct. J., of the County Court of the County of Wentworth, entered upon the findings of a jury. The facts are fully stated in the reasons for judgment.

13th and 14th February 1946. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and HOGG JJ.A.

C. W. R. Bowlby, K.C., for the defendants, appellants: The respondent, in view of s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, must adduce some evidence upon which the jury could excuse him: *Wright v. Canadian National Railway Company*, [1938] O.R. 66 at 67, 47 C.R.C. 269, [1938] 1 D.L.R. 496. Where the plaintiff is shown not to have looked before entering upon a crossing, a distinction is to be drawn according to whether or not he establishes something which a jury, acting judicially, could consider a reasonable excuse for his failure: *The Canadian Pacific Railway Company v. Smith et al.*, 62 S.C.R. 134, 26 C.R.C. 382, 59 D.L.R. 373, [1921] 3 W.W.R. 300; *Canadian Northern Railway Co. v. Prescesky*, [1924] S.C.R. 2, [1924] 2 D.L.R. 504.

The case should have been taken from the jury on the motion for non-suit, because the plaintiff was bound to prove that the accident had not been caused by his negligence, and he failed to do so: *Jewell v. Grand Trunk Railway Co. of Canada* (1924), 55 O.L.R. 617, 30 C.R.C. 55; *Highley v. Canadian Pacific Railway Co.*, 64 O.L.R. 615, 36 C.R.C. 217, [1930] 1 D.L.R. 630.

In the alternative, we are entitled at least to a new trial, on the ground that the jury's findings were perverse.

O. M. Walsh, K.C., for the plaintiff, respondent: The jury appreciated that they were the sole judges of the facts in this case. The charge of the trial judge was full and proper in all respects. The jury found that the street-car had not been under proper control when approaching a busy crossing. It was the motorman's duty to have his street-car under proper control, and his failure to do so was the direct and proximate cause of the accident: *British Columbia Electric Railway Company, Limited v. Loach*, [1916] 1 A.C. 719, 20 C.R.C. 309, 23 D.L.R. 4, 8 W.W.R. 1263, 32 W.L.R. 169. It was the duty of the motorman to sound his gong and give a warning of approaching danger: *The Grand Trunk Railway Company of Canada v. Griffith et al.* (1911), 45 S.C.R. 380, 13 C.R.C. 302. It was for the jury to

say whether or not the motorman's negligence was the sole cause of the accident, and whether the plaintiff should be absolved of contributory negligence in the legal sense: *Sershall v. Toronto Transportation Commission*, [1939] S.C.R. 287, 50 C.R.T.C. 23, [1939] 3 D.L.R. 193.

The jury was the proper tribunal to find whether or not the street-car was travelling at an excessive speed: *Nixon v. The Ottawa Electric Railway Company*, [1933] S.C.R. 154, 40 C.R.C. 264, [1933] 1 D.L.R. 609.

There was evidence to support each of the jury's findings; their verdict was not perverse, and it should not be interfered with in any way: *Staley v. British Columbia Electric Railway Company, Limited*, [1938] S.C.R. 387, 48 C.R.C. 19, [1938] 3 D.L.R. 81.

C. W. R. Bowlby, K.C., in reply, referred, on the question of the statutory onus, to *Kielb v. Canadian National Railway Co.*, [1941] O.W.N. 286, 53 C.R.T.C. 395, [1941] 3 D.L.R. 665.

Cur. adv. vult.

13th March 1946. ROBERTSON C.J.O. (*dissenting in part*):— This is an appeal by the defendants from the judgment of Judge Lazier, of the County Court of the County of Wentworth, dated 18th December 1945, upon the findings of the jury.

The respondent was driving his motor vehicle westerly on Beach Road, in the city of Hamilton. He had crossed Kenilworth Avenue, and had reached a point where the appellant's railway crosses Beach Road, when his motor vehicle was struck by a street-car of appellant. The street-car had approached Beach Road from the north on a private right-of-way. The appellant's railway tracks do not cross Beach Road at a right angle. Their car was travelling in a south-easterly direction in crossing the street. As it approached Beach Road it was visible to anyone travelling on Beach Road, as the respondent was, for a very considerable distance before it reached Beach Road. The accident happened on the 13th March 1945, early in the afternoon, and visibility was good. The respondent's vehicle was travelling at from 10 to 12 miles per hour as it approached the appellant's railway tracks. The respondent had looked to his right when he was still some 75 feet to the east of the railway tracks, and, for some reason, he did not see the street-car

approaching. He did not look again until he had proceeded to within some 10 feet of the railway tracks, when, looking to his right, he saw the street-car, which was then 60 feet away but approaching at a speed that the respondent puts at from 30 to 35 miles per hour. The respondent says that it would then have been impossible to stop his motor car before it reached the railway tracks, notwithstanding that it was travelling at only 10 or 12 miles per hour. He tried to avoid a collision by turning somewhat to his left. In the result the street-car ran into the motor car and caused the damage that the respondent has sued to recover.

The jury found that the respondent had satisfied them that the loss and damage sustained by him did not arise through his negligence or improper conduct. They found the appellants were guilty of negligence which caused or contributed to the accident, and they specified, as such negligence, the following: "Did not sound gong. Excessive speed approaching busy crossing at a rush hour. Car not under proper control approaching busy crossing." They assessed the damages at \$346.25, for which amount judgment was entered with costs.

Upon this appeal it is contended for the appellants that there was no evidence adduced on which a finding of negligence on the part of the appellants, and that the damages claimed were caused by any negligent act or omission on their part, could be made, and that, on the contrary, the evidence established that the respondent's damages were caused by his own negligence in failing to keep a proper look-out on approaching the street-car tracks.

At the close of the respondent's case the appellants' counsel moved for a non-suit. This being refused, the appellants elected to call no witnesses, and the case went to the jury upon the evidence of respondent's witnesses.

In my opinion the finding of the jury that the respondent had satisfied them that the loss and damage did not arise through his negligence or improper conduct cannot be supported upon the evidence. On the contrary, the evidence plainly establishes the lack of reasonable care on the part of respondent. He was well acquainted with the locality, and travelled frequently the street upon which the accident occurred. According to his own statement the view he had in the direction from which the street-car came, from the point where he first looked in that direction—

he then being 75 feet east of the railway tracks—was not such that he should have proceeded to cross the railway tracks without looking again. In fact, his counsel spent some time in argument in an effort to establish that the respondent was not to be charged with negligence in having failed to see the street-car when he looked in the direction in which it was, from a point 75 feet from the railway tracks. He knew that the tracks were a short distance ahead of him, and that the appellants' cars came upon their own right-of-way to the highway, and it was his duty, before proceeding to cross the tracks, to look when he reached a point from which he could see clearly whether any car was approaching. Admittedly, he did not do that until he had got so close to the railway tracks that he could not stop his car before reaching them. It is no answer to say that he had to look out for cars possibly coming from the opposite direction as well. He had time to look both ways, even if he had to stop his motor car to do it. The fact that he did look to his right, when too close to the railway tracks, is evidence that he realized that it was necessary that he should look. His mistake was in leaving it until it was too late.

I am, however, of the further opinion that there was evidence to support the jury's findings of negligence on the part of the appellants. The person in charge of the street-car had an unobstructed view ahead of him where the railway tracks crossed the highway. If he had kept a proper look-out he could not have failed to see the motor car approaching the railway tracks with the obvious intention of crossing them. While the motor car was proceeding at a quite moderate speed, there was no indication of an intention to stop, so far as the evidence discloses. Seeing some one ahead of him plainly in danger, it was the duty of the driver of the street-car to get his car under control, and, if he could not stop in time, at least to sound his gong. The evidence of the respondent is that if the gong had sounded, he would have heard it, and he heard no sound of a gong. In any event, the findings of the jury in regard to negligence on the part of appellants are reasonably supported by the evidence. I refer to *The Royal Trust Company v. Toronto Transportation Commission*, [1935] S.C.R. 671, 44 C.R.C. 90, [1935] 3 D.L.R. 420.

We cannot substitute our own view for the answer of the jury to the first question. A new trial is, therefore, necessary.

The appeal should be allowed, with costs, and there should be a new trial. The costs of the former trial should be in the discretion of the judge before whom the new trial is had.

HENDERSON J.A.:—This is an appeal by the defendants from the judgment of Judge Lazier, of the County Court of the County of Wentworth, dated 18th December 1945, upon the findings of the jury.

The facts are stated in the opinions of my Lord the Chief Justice and of my brother Hogg, which I have had the privilege of reading.

The jury found that the plaintiff had satisfied them that the loss and damage sustained by him did not arise through his negligence or improper conduct. I agree that this verdict is perverse and, in my opinion, indefensible. The jury found that the defendants were guilty of negligence which caused or contributed to the accident, and that the defendants' negligence consisted of (1) not sounding the gong; (2) excessive speed approaching a busy crossing at a rush hour; and (3) that the street car was not under control approaching a busy crossing. The uncontradicted evidence is that the only moving traffic in the neighbourhood at the time of the collision was the plaintiff's motor car and the defendants' street-car, and I am therefore of opinion that these answers are also perverse and not supported by any evidence whatever.

I would therefore allow the appeal with costs and dismiss the action with costs.

HOGG J.A.:—On the 13th March 1945, the plaintiff was driving his motor car in a westerly direction along Beach Road, in the city of Hamilton, having with him one Anthony Popp. He stopped at Kenilworth Avenue, where that street crosses Beach Road. The defendants' street-car tracks cross Beach Road approximately 300 feet west of the east side of Kenilworth Avenue. The plaintiff then crossed Kenilworth Avenue, and when he reached a point 75 feet distant from the street railway tracks he looked to his right and says that he did not see a street-car approaching from that direction. At that point a street-car would be visible for a considerable distance to the north. The plaintiff then proceeded towards the tracks at from 10 to 12 miles per hour, without looking again to ascertain if a street-car was approaching until he reached a point about 10 feet

from the rails, when he looked again to his right and saw a street-car, which he estimates was 60 feet away, coming towards him at a speed which he thinks was from 30 to 35 miles per hour. The day was clear, the pavement dry, and the brakes on the plaintiff's motor car in good working order. The plaintiff did not try to stop, but endeavoured to turn out of the way of the street-car; he did not apply his brakes, and came into collision with the street-car. The plaintiff's evidence, in part, as to his actions just before the accident occurred, is as follows:

"Q. Had you looked when you were 25 feet from the track, you would have easily seen the street-car coming? A. Not unless you took an awful good look.

"Q. It is sometimes wise when street-cars are coming? A. Yes, sir.

"Q. Supposing you took a good look you could not fail to see a street-car? A. No.

"Q. And you could easily stop your car? A. Within 25 feet, yes sir."

There was no evidence offered on the part of the defence at the trial and the defendants' counsel moved for non-suit. The trial judge reserved his decision on the motion for non-suit, allowed the case to go to the jury, and afterwards dismissed the application for non-suit.

Certain questions were placed before the jury by the trial judge. To the first question, "Has the plaintiff satisfied you that the loss and damages sustained by him did not arise through his negligence or improper conduct?" the jury gave the answer, "Yes." With respect to the question, "Were the defendants guilty of any negligence which caused or contributed to the accident?" the answer was "Yes", and the particulars were: "Did not sound gong. Excessive speed approaching busy crossing at a rush hour. Car not under proper control approaching busy crossing."

The defendants appeal on the ground that there is no evidence upon which a jury, acting reasonably, could find that the defendants committed any acts of negligence which contributed to or were the cause of the accident.

With reference to the matter of the speed of the street-car, there is the evidence of the plaintiff that it was approaching the crossing at Beach Road at between 30 and 35 miles per hour, but whether that is evidence of excessive speed is relative to, and

depends wholly upon, the remaining part of the jury's finding, namely, that the crossing was a busy one, and that there existed a rush hour. Whether the crossing was busy or not, and whether there existed a rush hour, must be considered with reference solely to the time at which the accident happened. Unless these two conditions or circumstances are present, and there is no evidence that this is so, in my opinion there is nothing to support the finding of the jury that the speed of the street car was excessive. And there must also be evidence that the crossing was a busy one at the time of the mishap to support the further finding that the street-car was not under proper control.

The crossing and the streets in its vicinity may be the scene of great activity, and be extremely busy, on certain occasions or times, but this was not so at the time of the accident; on the other hand, the evidence given by the plaintiff on this subject is entirely to the contrary. His testimony on this point is as follows:

"Q. There was no other thing to look for except street-cars? A. No, sir.

"Q. There is no other street there? A. There's the little road that comes in before you get to the street car line.

"Q. That is, you go across Kenilworth, going west, and come to a little street that goes off Beach Road to the north? A. Yes, sir.

"Q. That is a short street? A. It just goes in around and into Burlington Street.

"Q. There was nothing coming on that street? A. No, sir.

"Q. So the only thing you had to watch for that day, as you went west on Beach Road, was street cars? A. Yes, sir."

The finding by the jury of excessive speed and the want of control are predicated upon and conditional upon the crossing being a busy one and the time being a rush hour at the time of the accident, and I am unable to conclude that there is a scintilla of evidence that these conditions prevailed. The inference which, I think, must be drawn from these findings is that the jury would not have found excessive speed or want of control if they had not considered the crossing a busy one and the time a rush hour at the time of the mishap. It was said in *Follick v. Wabash R.R. Co.* (1919), 45 O.L.R. 528, 25 C.R.C. 245, 48 D.L.R. 526, affirmed *sub nom. Wabash Railway Company v. Follick* (1920), 60 S.C.R. 375, 26 C.R.C. 349, 56 D.L.R. 201, that excessive speed would

be such speed as would be excessive in all the circumstances of the case.

The remaining finding of the jury, of negligence on the part of the street-car operator, is that he did not sound his gong. The evidence in support of this finding is that both the plaintiff and Popp said they did not hear a gong or other warning, and that they would have heard it if it had sounded. Possibly it is not material that they do not say that the plaintiff would have acted otherwise than he did if he had heard a gong sounded. It seems to me that the crucial question is: Can the evidence of lack of warning, that is to say, the testimony of the plaintiff and Popp that they did not hear a gong sounding, under the circumstances of this accident, be held to be any evidence upon which a finding of negligence on the part of the defendants, contributing to the accident, can properly and reasonably be founded, or was the sole reason for the accident the want of reasonable care on the part of the plaintiff? As Davis J.A. said in *Falsetto v. Brown et al.*, [1933] O.R. 645, [1933] 3 D.L.R. 545: "After all, the question is: Who was responsible for the accident? and it is answered in motor vehicle cases in nearly every case upon the particular facts."

From the time the plaintiff looked to his right at 75 feet distant from the street-car tracks, until he was 10 feet distant from the same, he paid no regard whatever as to whether a street-car was approaching or not. He never looked to his right again until it was too late to avoid the collision, although there is no evidence that his attention was required for any purpose whatever, other than the mere operation of his motor car in a safe and proper manner.

Although the subject has been discussed in many judgments, I do not think it entirely out of place to refer again to the parts to be played in a trial by the judge and the jury.

In *Littley et al. v. Brooks and Canadian National Railway Company*, [1930] S.C.R. 416, 37 C.R.C. 13, [1930] 4 D.L.R. 1, Rinfret J. (now C.J.), in speaking of the function of a judge and the jury with respect to a trial in which negligence is alleged, quoted the following remarks of Lord Cairns in *The Metropolitan Railway Company v. Jackson* (1877), 3 App. Cas. 193 at 197:

"The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which

negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever."

This principle was stated in other words by Meredith C.J.C.P. in *Sitkoff v. Toronto R.W. Co.* (1916), 36 O.L.R. 97, 29 D.L.R. 498, where he referred to the language of Erle C.J. in *Cotton v. Wood* (1860), 8 C.B.N.S. 568, 141 E.R. 1288:

" . . . the right and duty of the Courts to determine whether there is evidence upon which reasonable men could find, before letting any case go to a jury, should be always exercised, that no surrender or invasion of either province should be permitted, however difficult it may occasionally be to tell on which side of the line some exceptional case may be. Reasonableness—whether it is called a question of law or of fact—such as this 'belongeth to the knowledge of the law, and is therefore to be decided by the Justices.' "

The statement of the rule by Anglin J. (afterwards C.J.) in *The Grand Trunk Railway Company of Canada v. Griffith et al.* (1911), 45 S.C.R. 380 at 400, 13 C.R.C. 302, puts the matter clearly with respect to its application to a case of the same character as that now under consideration: "The moment the decision is reached that the statutory signals, if given, might have prevented the accident and there is evidence of their omission, it is not proper for the trial judge to withdraw the case from the jury, (unless, indeed, what is incontrovertibly contributory negligence is admitted or is so clearly proved in the plaintiff's own case that it would be proper to direct a jury to find it) and if, upon the case being submitted to them, the jury see fit to draw the inference that the omission of the signals was in fact the cause of the accident, it is not competent for an appellate court to disturb that conclusion."

There are several decisions in the Supreme Court of Canada and in the Courts of this Province upon the question whether evidence of the absence of warning by the operator of a train or street-car upon approaching a street crossing is evidence upon which the jury can find negligence on the part of the railway company, where there is also evidence that the driver of the motor car, who has been injured in an ensuing collision, has driven upon the tracks without having looked to ascertain whether the street-car or train was approaching. All cases of this nature depend entirely upon their own special circumstances, and the extent of care required depends on the particular conditions of each case.

In *The Canadian Pacific Railway Company v. Smith et al.*, 62 S.C.R. 134, 26 C.R.C. 382, 59 D.L.R. 373, [1921] 3 W.W.R. 300, the plaintiffs, who were in a motor car, proceeded to cross a railway track when a train was approaching. The motor car was struck and the plaintiffs sustained injuries. The evidence was to the effect that neither was the train whistle sounded nor the bell rung. There was also evidence that the driver of the motor car attempted to cross the tracks without looking for the approaching train. It was held that it was the negligence of the plaintiff, and not that of the railway company, which caused the accident, and that the plaintiffs' action should be dismissed. Davies C.J. said, at p. 135:

"The rule so requiring persons crossing railway tracks to look for a possible approaching train may not be an absolutely arbitrary one. Circumstances may exist which might excuse their not looking, but those circumstances must be such as would reasonably warrant a jury in finding they were excused from their duty in that regard. It is not enough to prove that some precautions required on the part of the railway, such as whistling or ringing the bell before coming to the crossing, were not observed or followed by the train officials, of which there was evidence on which a jury might so find in this case."

The learned Chief Justice stated that he could not reach the conclusion that "there were considerations from which a jury might reasonably conclude that it was the failure to give the statutory warnings rather than the plaintiff's own recklessness that was the *causa causans* of the injury and that those considerations must be passed upon by the jury." He further said that the evidence removed the possibility of any finding that

the plaintiff looked to see if a train was approaching before he drove his motor car upon the crossing, and that if he had looked he could not have failed to see the approaching train, and there were no facts which showed any excuse for the plaintiff not looking. Duff J. (afterwards C.J.) concurred in the judgment of the Chief Justice. Mignault J., at p. 152, made the following observation: "Here the plaintiff was in full view of the approaching train for a distance of half a mile and, in my opinion, was the author of his own misfortune. In the words of Lord Cairns [in *Dublin, Wicklow, and Wexford Railway Company v. Slattery* (1878), 3 App. Cas. 1155], it was the folly and recklessness of the plaintiff, and not the carelessness of the company, which caused the accident." Duff J. referred to the judgment in the *Smith* case, *supra*, in *Canadian Northern Railway Co. v. Prescesky*, [1924] S.C.R. 2, [1924] 2 D.L.R. 504. The facts in this appeal were that the railway company failed to give the usual warnings, and the plaintiff testified that if the whistle had been sounded and the bell rung, he would have heard and thus avoided the accident, and he gave certain circumstances which he said led to his not giving greater attention to the possibility of a train coming. The trial judge dismissed the action, and a new trial was ordered. Duff J., at p. 6, said:

"There is some misapprehension, I think, a misapprehension which to me, I must admit, is unaccountable, of the purport of the decision in *Smith's Case*. In that case the evidence adduced by the plaintiff himself established conclusively that if the plaintiff had given his attention to the matter at all he must have seen the train by which he was struck, a train which he knew would by the usual rule be passing at that time. As to excuse for failing to look, there was no suggestion of an excuse in the respondent's (plaintiff's) own evidence."

Duff J. also referred to the decision of the Court in *Canadian National Railways v. Clark*, [1923] S.C.R. 730, 29 C.R.C. 45, [1923] 4 D.L.R. 727, [1923] 3 W.W.R. 938, and said that there circumstances existed "which might properly be considered by the jury in the inquiry whether or not there was a reasonable excuse for the failure of the respondent to see the train by which he was injured." In that case there was evidence to the effect that the plaintiff had carefully listened for bell and whistle signals because his view of the track was obstructed.

Swartz Bros. Limited et al. v. Wills, [1935] S.C.R. 628, [1935] 3 D.L.R. 277, was an appeal respecting a collision between a motor car and a motor truck at a street intersection. The judgment of the Court was delivered by Cannon J., who said, at p. 634:

"Where there is nothing to obstruct the vision and there is a duty to look, it is negligence not to see what is clearly visible. The respondent in this case admits that he did not see the truck after he started to cross. It was then clearly visible; and, unfortunately for the plaintiff, we must reach the conclusion that his injuries resulted from his own negligence in taking a chance to cross the intersection ahead of the truck which clearly had the right of way."

In *Grand Trunk Railway Company of Canada v. Hainer* (1905), 36 S.C.R. 180, 5 C.R.C. 59, Nesbitt J. said, at p. 192:

" . . . I desire to repeat that had it appeared by the evidence in this case for the plaintiffs that the defendants were guilty of negligence, yet, had the deceased exercised that care both of sight and hearing that they were bound to exercise they must have seen or heard the approaching train then there would have been nothing for the jury because there would have been a failure on the part of the plaintiffs to prove that the negligence established was the immediate and proximate cause of the calamity and the court would have been left to mere conjecture as to whether the accident occurred owing to the defendants' negligence or to the negligence of the deceased in not looking."

In *The Wabash Railroad Company v. Misener et al.* (1906), 38 S.C.R. 94, 6 C.R.C. 70, Davies J. said, with reference to persons travelling along a highway and passing or attempting to cross over a level railway crossing: "They must act as reasonable and sentient beings and, unless excused by special circumstances, must look before attempting to cross to see whether they can do so with safety. If they choose, blindly, recklessly or foolishly to run into danger, they must surely take the consequences."

In *Jewell v. Grand Trunk Railway Co. of Canada* (1924), 55 O.L.R. 617, 30 C.R.C. 55, where the plaintiff said that after he got within 150 feet of the railway tracks he no longer looked to see if a train was approaching, and depended after that upon not hearing any whistle or bell, and the evidence established that a

warning was not given by the train, it was held by the Court of Appeal that the negligence of the railway company in not giving the usual warnings did not excuse the plaintiff from his duty to exercise care in order to avoid the consequences of the railway company's neglect, and it was said that the plaintiff had no excuse, unless it was the absence of hearing a warning, for not looking to see if a train was approaching. A judgment of nonsuit by the trial judge was upheld.

Wallace v. Grand Trunk R.W. Co. (1921), 49 O.L.R. 117, 64 D.L.R. 75, dealt with an accident at a railway crossing, and there was evidence that neither was the whistle blown nor the bell sounded on an approaching engine. A boy who was seated in a covered buggy, drawn by a horse, was killed when a collision occurred between the buggy and the locomotive. In that case it was held that there was evidence to go to the jury as to negligence on the part of the railway company. The evidence showed that although the driver of the buggy did not look after he had passed a point 200 feet from the crossing, to see if a train was approaching, the buggy was drawn by a horse which was nervous with regard to railway trains and which required handling; that the railway tracks crossed the road at an acute angle and an approaching train could only be seen by one in the buggy by leaning forward and looking backward. In this case there were matters that might reasonably occupy the attention of the person approaching the crossing.

In *Gauley v. Canadian Pacific Railway Co.; Birkett v. Canadian Pacific Railway Co.*, 65 O.L.R. 477, 36 C.R.C. 365, [1930] 4 D.L.R. 354, the plaintiff said he looked for approaching trains when he drove towards the crossing and that he had a clear view along the railway track for some 200 to 300 feet. He neither saw a train nor heard a whistle. He gave no explanation other than that he was looking in an opposite direction to see if a train was approaching from that quarter. It was held that the evidence established that the determining or effective cause of the accident was the plaintiff's own negligence in running his motor car in front of the train, and that the jury was not justified in finding the defendants negligent.

In *Engel v. Toronto Transportation Commission*, 59 O.L.R. 514, [1926] 4 D.L.R. 986, it was held that the negligence of the driver of a motor car in attempting to cross in front of a rapidly moving street-car was the sole cause of the collision. Middleton

J.A. said, at p. 517: "The street car had the right of way, and the motorman would expect the driver of the automobile to slow his car so as to permit the street car to pass."

The principle to be deduced from the cases seems to be that referred to by Duff J. in the *Prescesky* case, *supra*, and that is, that it is the negligence of the driver of a motor car when approaching a railway crossing, in not looking to ascertain whether a train or a street-car is approaching, when the circumstances are such that there is no suggestion of an excuse for not so looking, which renders such driver entirely liable for the mishap, although a warning has not been given by the train or tram-car with which the motor car comes into collision. But, on the other hand, if there is some excuse, no matter how slight, for the motor car driver not looking to see whether a street-car or train is approaching, then the failure of the approaching street-car or train to give warning is sufficient evidence of negligence to be considered by the jury. It is not open to mere conjecture or speculation as to what may have caused the accident.

In cases of this nature, where there is clear evidence of the total failure of the driver of a motor car to take precautions to see if danger is approaching, the maxim *volenti non fit injuria* might, I think, not unreasonably be considered to apply, because the existence of the street-railway crossing is an indication of danger to those approaching it. The words approved by Lord Shaw of Dunfermline in *Letang v. Ottawa Electric Railway Company*, [1926] A.C. 725, 32 C.R.C. 150, [1926] 3 D.L.R. 457, [1926] 3 W.W.R. 88, 41 Que. K.B. 312, would seem not to be inappropriate: ". . . the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."

Orde J. referred in *Aikens v. City of Kingston et al.*, 53 O.L.R. 41, [1923] 3 D.L.R. 869, a case which concerned a collision between motor cars, to "a premium" being put "upon reckless driving" because of the circumstances there present. I think that these words may not unreasonably be used with reference to the conduct of the plaintiff.

If the plaintiff had given his attention to the matter at all, he must have seen the street-car, by which he was afterwards struck, approaching. There was not even an "adminiculum of evidence", to use the words of Riddell J. in *Farber v. Toronto Transportation Commission*, 56 O.L.R. 537, [1925] 2 D.L.R. 729,

given by the plaintiff which served as an excuse for his failure to see the oncoming car. The plaintiff could have stopped his motor car even at a distance of 25 feet from the crossing, according to his own testimony, and so have avoided the danger which overtook him. I have concluded that "what is incontrovertibly contributory negligence", to use the words of Anglin J. already referred to in the *Griffith* case, was admitted and "so clearly proved in the plaintiff's own case" that the defendants were entitled to succeed on their motion for non-suit, and that the jury were not reasonable in finding as they did: see also *Ciaralli et al. v. Toronto Transportation Commission*, [1933] O.W.N. 358.

The evidence does not support the finding of the jury that the plaintiff had satisfied them that "the loss and damage sustained by him did not arise through his negligence or improper conduct", and their answer to this question could not properly or reasonably be given in view of the admitted negligence of the plaintiff.

The Negligence Act, R.S.O. 1937, c. 115, is not a factor where the plaintiff's negligence is the actual cause of whatever damage he sustained: *Gauley v. Canadian Pacific Railway Co.*, *supra*; *Topping v. Oshawa Street Railway Co.*, 66 O.L.R. 618, [1931] 2 D.L.R. 263.

I think the appeal should be allowed and the action dismissed, with costs of the trial and the appeal to the defendants.

Appeal allowed with costs and action dismissed with costs,
ROBERTSON C.J.O. *dissenting in part.*

Solicitors for the plaintiff, respondent: Walsh & Evans,
Hamilton.

Solicitors for the defendants, appellants: Bowlby & Parker,
Hamilton.

[COURT OF APPEAL.]

Re Starr.

Wills—Conditions—Uncertainty and Repugnancy—Beneficiary to “Re-join” Church and “Practise” Faith.

A testatrix, after directing that the residue of her estate should be divided equally among her son and her two daughters, provided in the next clause that if the son predeceased her without leaving children his share should lapse, and be divided between the daughters. The following clause was a direction to the executors and trustees “that should my son Emil refuse to rejoin the Catholic Church and practice [*sic*] the Catholic Faith within six months after my death, then his share shall also lapse and be entitled to receive only . . . \$500, and the balance of his original share shall be divided equally, share and share alike, between my two daughters”.

Held, this last clause was valid and effectual. It constituted a condition subsequent, and was not void for uncertainty, since the Court could see from the beginning precisely and distinctly what the event was, upon the happening of which the preceding vested estate was to determine. *Clavering v. Ellison et al.* (1859), 7 H.L. Cas. 707; *Sifton v. Sifton et al.*, [1938] A.C. 656, applied. Nor (*ROBERTSON C.J.O. dubitante*) was it repugnant to the earlier clause, since the testatrix had at no time intended to make an absolute gift of one-third of the residue to the son.

Judgment of URQUHART J., [1946] O.W.N. 121, reversed.

AN APPEAL by the two daughters of Mary Starr, deceased, from the order of Urquhart J., [1946] O.W.N. 121, declaring that a clause in the deceased's will was valid and effectual. The provisions of the will, and the questions asked of the Court, are set out in the reasons for judgment.

6th and 7th February 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

R. F. Wilson, K.C., for the appellants: The question whether the condition is a condition precedent or a condition subsequent is one of fact in all cases: Theobald on Wills, 9th ed. 1939, p. 510; Jarman on Wills, 7th ed. 1930, pp. 1444, 1446. The condition here in question relates to the acquisition of a one-third interest in the residue, and on the language of the wills, and the cases, it is a condition precedent. If the respondent fails to perform the condition, his share is only \$500, and the difference between that amount and a one-third share goes to the appellants. There could be no vesting of the one-third interest during the six months' period: *Randal v. Payne* (1779), 1 Bro. C.C. 55, 28 E.R. 980.

The condition is valid: 34 Halsbury, 2nd ed. 1940, p. 107; Theobald, *op. cit.*, p. 511; *Hodgson v. Halford* (1879), 11 Ch. D. 959; *In re May*; *Eggart v. May*, [1932] 1 Ch. 99; *Wainwright v. Miller*, [1897] 2 Ch. 255; *Re Curran*, [1939] O.W.N. 191.

A gift over in the event of a change of religion by a legatee is valid. This case comes within the second of the three conditions discussed in *In re May, supra*. [ROACH J.A.: How is it to be ascertained whether the respondent has complied with the condition?] The cases indicate that the executors and the courts can decide when a man has joined the Catholic Church. The respondent here has six months after the testatrix's death in which to rejoin the Catholic Church and practise the Catholic faith. The Court can see from the beginning what circumstances will make the condition operative.

The condition is not repugnant: *In re Freeman; Hope v. Freeman*, [1910] 1 Ch. 681 at 691.

The clause in question involves two distinct and severable conditions, and if the son refuses to rejoin the Catholic Church within the time limited the further condition as to practice of the Catholic faith is immaterial, since his failure to comply with the first condition will have destroyed his right to a one-third share.

H. G. Steen, for the respondent: The clause is invalid both for uncertainty and for repugnancy. It is a condition subsequent, and must be strictly construed: *Clavering v. Ellison et al.* (1859), 7 H.L. Cas. 707, 11 E.R. 282. The earlier gift of a one-third share of the residue is complete and absolute, and this share vested in the son immediately upon the testatrix's death. This share, however, was subject to being divested at the end of six months if the son did not comply with the condition. The condition is one which requires time for its performance, and the Court will therefore construe it as a condition subsequent. Practising a faith must consist of a series of acts, a course of conduct over a period of time. [LAIDLAW J.A.: The predominating thought in the mind of the testatrix was that if her son rejoined the Church he would share with her other children.] [ROACH J.A.: She was not imposing a penalty; she was offering an inducement.] I refer to *In re Ross* (1904), 7 O.L.R. 493 at 495. In the case at bar the clause was a condition of the retention, rather than the acquisition, of the share. It is impossible to practise the Catholic faith by a single act; the clause does not refer to commencing to practise. [ROACH J.A.: He has six months in which to comply.]

If there is any doubt whether a condition is precedent or subsequent, the Court treats it as subsequent: *Sifton v. Sifton et al.*,

[1938] A.C. 656, [1938] 3 All E.R. 435, [1938] O.R. 529 (*sub nom. Re Sifton*), [1938] 3 D.L.R. 577, [1938] 2 W.W.R. 465. The same case is authority for the proposition that to defeat a vested estate a condition must be certain both in expression and in operation, and reference is made to *In re Exmouth; Exmouth v. Praed* (1883), 23 Ch. D. 158 at 164-5. Here the respondent is entitled to have it categorically stated what he must do in order to avoid a forfeiture under the will. It is not a matter of discretion in the executor to determine whether or not he has complied with the condition.

The clause is indefinite in that it does not set forth what degree of compliance is required: *Clayton et al. v. Ramsden et al.*, [1943] A.C. 320 at 328-30. There have been many cases in which the language employed was more precise than that in this will, but the courts have held conditions subsequent to be invalid for uncertainty.

The condition is also void as being repugnant to the prior outright gift, and the son is entitled to the one-third share free from the condition: *In re Thompson; Griffith v. Thompson* (1896), 44 W.R. 582.

W. J. McGibbon, K.C., for the executors, submitted his rights to the Court.

R. F. Wilson, K.C., in reply.

Cur. adv. vult.

13th March 1946. ROBERTSON C.J.O.:—I have had the privilege of reading the reasons for judgment prepared by LAIDLAW and ROACH J.J.A. In my opinion there is no difficulty created by uncertainty in the condition affecting the share of residue of the son Emil should he refuse to rejoin the Catholic Church and practise the Catholic faith within six months after the death of the testatrix. The act that is to bring the condition into operation is to “refuse”. Can that be more vague or uncertain than, for example, to “consent”? In either case, depending upon circumstances, it may not be entirely simple to determine with absolute certainty whether there has been “refusal” or “consent”, but that is not by reason of any vagueness or uncertainty in the expression of the testatrix’s intention. Any difficulty will arise from the character of the available evidence in the particular case.

While I agree that there may be a refusal within the meaning of the condition that is not evidenced by words spoken or written by the son, but that may be sufficiently founded upon his conduct, I should not like to go the length of saying that, as used here, the word "refuse" simply means "omit", as my brothers Laidlaw and Roach have done. It is quite possible that conditions might exist where a mere omission could not import a refusal. The son might conceivably be in such a mental state, or be so situated physically, that it would be impossible for him to rejoin the Catholic Church within six months of his mother's death. His omission to rejoin could not in such circumstances be regarded as a refusal.

I have had more difficulty with the question whether the condition is void for repugnancy. The argument against the validity of the condition is that the testatrix by one clause devises and bequeaths all the rest and residue of her estate to her three children, Isabelle, Julia and Emil, "to be divided equal, share and share alike, and in such proportions or manner as the executors and trustees may see fit and proper." Then follows a clause providing that in the event of the son's death before the demise of the testatrix and leaving no children of his own as heirs, his share should lapse and be divided, share and share alike, between the two daughters. Following this is the clause that I have already discussed, as to which it is contended that it is too vague and uncertain to be valid, and that it is also invalid as being repugnant to the earlier gift of an equal share of the residue.

Both of my learned brothers, by reading the three clauses together, have made out of them a conditional limitation in the case of the son Emil. I doubt very much whether it is legitimate construction, when the testatrix has by the same words given the residue in three equal shares among her three children, to give to these words the meaning of an immediate gift in the case of the two daughters and another meaning in the case of the son. What would have happened had all three survived their mother and all died within the six months' period? With respect, I am unable to avoid the impression that in this particular they have made a new will instead of construing the will before us. However, it is permissible to go a long way to give effect to a plain intention. There can be no doubt as to what the testatrix desired

should happen in the event of the refusal of Emil to rejoin the Catholic Church and practise the Catholic faith within six months after her death, and while I am not satisfied that what the will directs is not contrary to a well-settled principle of law (see Halsbury, 2nd ed., vol. 15 (1934), pp. 728-30, s. 1263, and vol. 34 (1940), pp. 110-2, s. 144; Jarman on Wills, 7th ed. 1930, pp. 1440-1; Williams on Executors, 12th ed. 1930, p. 817), I do not dissent from the conclusion of the majority of the Court that the clause in question is valid and effectual. As the six months' period within which the son Emil had to make his choice had not expired when the motion was brought on before Urquhart J., nor even when his order was made, the second question was plainly one that could not be answered on the evidence then available in the event of the disputed clause being held valid. I do not think that on this appeal, based on the same evidence, we should say anything by way of answer to the second question. I concur in the disposition of costs as proposed by LAIDLAW and ROACH JJ.A.

LAIDLAW J.A.:—This is an appeal by Isabelle Hergott and Julia Dehler, two of the children of the late Mary Starr, from a judgment of Urquhart J., dated the 22nd day of December 1946, holding that a certain condition attached to the share of a third child, Emil Starr, in the residue of the estate of Mary Starr, deceased, is invalid and of no effect, and that Emil Starr is entitled to a one-third share of the residue of the said estate absolutely.

Mary Starr died on or about the 4th August 1945, leaving a last will and testament dated the 11th January 1944. She nominated Mr. Edward Dehler and Mr. Albert Hergott to be executors and trustees of her will. Albert Hergott died on or about the 22nd June 1945, and administration of the property of the deceased was granted by the Surrogate Court of the County of Waterloo to Edward Dehler on the 18th October 1945.

I reproduce relevant parts of the will, the paragraphs of which I have numbered for convenience as follows:

"I devise and bequeath all my estate, real and personal, to my executors and trustees hereinafter named in trust for the purpose following:

.

“(1) All the rest and residue of my Estate, I devise and bequeath to my three children, Isabelle, Julia, and Emil, to be divided equal, share and share alike, and in such proportions or manner as the executors and trustees may see fit and proper.

“(2) I direct my Executors and Trustees, that in the event of the death of my son Emil before my demise, and leaving no children of his own as heirs, then his share shall lapse and be divided equal, share and share alike, between my two daughters, Julia and Isabelle.

“(3) I further direct my Executors and Trustees, that should my son Emil refuse to rejoin the Catholic Church and practice [*sic*] the Catholic Faith within six month[s] after my death, then his share shall also lapse, and be entitled to receive only Five Hundred Dollars (\$500.00), and the balance of his original share shall be divided equally, share and share alike, between my two daughters Isabelle and Julia.”

After the death of his mother and before the expiration of six months from that date, Emil Starr, through his counsel, contended that the condition attached to his share of the residue of the estate was null and void, and that he was entitled to one-third part thereof regardless of the condition. The executor thereupon made application under Rule 600 of the Rules of Practice and Procedure for the opinion, advice and direction of the Court upon the question whether the condition as quoted above in para. 3 is valid and effectual, and upon the question, “To what extent is Emil Starr entitled to share in the residue of the estate of the said Mary Starr, deceased?”

One may pause at the outset to survey the nature and magnitude of the task given to the Court. It must find the intention of the testatrix from the language used in the will, and from such surrounding circumstances as may properly be considered. The words used in the will were probably not her own, but written on her instructions to convey what was in her mind. She adopted the language as her own, believing that it adequately expressed her will. What did she really mean and intend by the language? Speaking generally, no aid can be derived from decided cases which do not establish a principle. The construction put by another judge upon another instrument is of no substantial help in ascertaining the intention of the testatrix in the case presently before the Court. *Jessel M.R., in Aspden v. Seddon* (1875), L.R.

10 Ch. 394, referred to in *Re Walker* (1925), 56 O.L.R. 517 at 522, says: "... I think it is the duty of a Judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another Judge upon an instrument, perhaps similar, but not the same." However, there are to be found in reported cases certain rules of construction to which I ought to adhere and which have been stated by me in *Re Hornell*, [1945] O.R. 58, [1945] 1 D.L.R. 440. For convenience, I restate them as follows:

(1) Read the will "without paying any attention to legal rules": *per* Lord Davey in *Comiskey et al. v. Bowring-Hanbury et al.*, [1905] A.C. 84 at 89; see also *Pearks v. Moseley et al.* (1880), 5 App. Cas. 714; *Re Russell* (1885), 52 L.T. 559 at 560.

(2) "... to have regard not only to the whole of the clause which is in question, but to the will as a whole which forms the context to the clause": *per* Lord Birkenhead L.C. in *Lucas-Tooth v. Lucas-Tooth et al.*, [1921] 1 A.C. 594 at 601; also *J. Lewis & Sons, Limited v. Dawson*, [1934] S.C.R. 676 at 679, [1934] 4 D.L.R. 753.

(3) Give effect, if possible, to all parts of the will: 34 Halsbury 2nd ed. 1940, p. 197, para. 252.

When the intention of the testatrix has been thus found, it is then necessary to inquire whether there is any rule of law which prevents effect being given to it: *Hodgson et ux. v. Ambrose et al.* (1780), 1 Dougl. K.B. 337 at 342, 99 E.R. 216, referred to in *Re Hornell*, *supra*.

I think the proper manner in which to proceed is this: to sit in the chair of the testatrix and endeavour to read the will through her eyes and possess the thoughts she had at the time the will was executed. Following that course, I have these thoughts: the testatrix was a devout Catholic; she had no doubt brought up her three children, Isabelle, Julia and Emil, in that faith, and all of them with her were members of the Catholic church. She knew and experienced the joy, comfort and satisfaction of a family united in one faith, and the influence of her faith on her mind and on her life was strong. For some reason her son Emil ceased to be a member of the Catholic Church, and that fact no doubt was a source of constant regret, worry and anxiety. When she came to provide for distribution of her worldly goods she cherished the hope that her son would rejoin

the Church and be united in the same faith as his sisters. I think she had no desire to hold forth an inducement to him to rejoin the Church, nor to penalize him if he did not do so. I think she wanted to leave the decision freely to him. If he rejoined the Church and became one in faith with his sisters, she would make no distinction whatever between them in the division of the residue of her estate. There would be but one united family of children with no preferred benefits to any one of them. If, on the other hand, Emil did not rejoin the Catholic Church by his own choice and within a reasonable time after her death, her two daughters should each receive larger portions of the residue than her son Emil. These are the thoughts to which I believe the testatrix intended to give effect. "Without paying any attention to legal rules", I think she meant to say: "If my son Emil rejoins the Catholic church and practises the Catholic faith within six months after my death, he shall be entitled to a share of the residue of my estate equal to that of each of my other children—If he does not rejoin the Catholic Church and practise the Catholic faith within six months after my death, he shall be entitled to receive the sum of \$500 from the residue of my estate." Do the language used, and the law, permit such a construction? I do not read para. 1 (as numbered above for convenience) separately from paras. 2 and 3. I think all three paragraphs must be read together, and that paras. 2 and 3 form part of the context to para. 1. It will be observed that para. 2 makes provision for the event of the death "of my son Emil before my demise". No mention is made of the event of the death of Isabelle or Julia. Likewise, in para. 3 the provision is directed expressly to the share of Emil. Both paras. 2 and 3 are supplementary to the provision made for Emil in para. 1, and while in form they are separate, nevertheless in substance the language in paras. 2 and 3 is an intimate part of para. 1 and not severable therefrom. If the three paragraphs be read as a whole, it is my opinion that the provision made in para. 1 is subordinate to the provision and condition which follows thereafter in para. 3, and the dominant provision must be given effect unless there be some rule or principle of law which prevents the Court from doing so. I read the three clauses under consideration as though at the end of para. 1 there had been added the following words, namely, "subject to the following provisions and conditions". Read and

construed in that way, one-third of the residue of the estate did not vest in Emil absolutely upon the death of the testatrix, but his right thereto was contingent upon a subsequent act on his part. It depended upon whether or not he refused to rejoin the Catholic Church and practise the Catholic faith within the stipulated period of six months after the death of the testatrix. If he refused, the share of one-third of the residue of the estate became divested from him, and in place thereof he was given a different share of the residue, namely, the sum of \$500. If he did not refuse to fulfil the requirements of the provision within the time stated, he became entitled to the full one-third part of the residue absolutely. I interpret non-refusal as tantamount to a willingness and requirement that he rejoin the Catholic Church and practise the Catholic faith. While the condition is penned in the negative form, nevertheless it was meant and intended in application to be positive, and the language used can be so construed without violating any rule of law or canon of construction.

There is grave danger that the true intention of the testatrix might be defeated by inappropriate application of canons of construction: see *Lucas-Tooth v. Lucas-Tooth et al.*, *supra*, at p. 601. Having found the intention of the testatrix to my satisfaction, I now inquire whether there is any rule of law which prevents effect being given to it: *Hodgson et ux. v. Ambrose et al.*, *supra*. The learned trial judge was of opinion that the language used in para. 3 "is ineffective, because of the uncertainty and repugnancy, to cut down the absolute gift" contained in para. 1. The words relied upon by counsel as showing uncertainty are "refuse", "rejoin", "Catholic Church", "practise" and "Catholic faith". I read the word "refuse" as being synonymous with the word "omit". The word "rejoin" is not ambiguous except in so far as counsel seeks to make it so. Likewise the words "Catholic Church", "practise" and "Catholic faith" are sufficiently certain to enable the Court to give effect thereto. We must not lose sight of the context and the circumstances to which the language is applicable. I am quite sure that the words and the language used were not uncertain in meaning to the testatrix, or to the other beneficiaries of the residue, and in particular they would not be uncertain in meaning to the executor. I may also add that in my opinion the words "rejoin the Catholic Church and practise the Catholic faith" as a phrase are capable of a definite meaning.

I do not divide it into separate conditions, and think that it was not so intended. One would know at any time whether Emil had omitted to rejoin the Catholic Church and practise the Catholic faith. There is no requirement as to continuance of either membership or practice, or as to the extent of the practice, but that does not create uncertainty. In my opinion the act of rejoining the Church would be an act of practising the Catholic faith, and any subsequent act commonly done by the followers of that faith would suffice to satisfy the requirements of the provision.

In this view the provision and condition does not contain any element of uncertainty to me sufficient to make the clause ineffective. Reading the provisions of the will in question in the manner I have indicated, the question of repugnancy does not arise. I conclude that there is no rule or principle of law which prevents full effect being given to the provisions in para. 3.

My judgment, therefore, in answer to the question submitted by the executor for the opinion, advice and direction of the Court, is that the condition attached to the share of Emil Starr in the residue of the said estate is valid and effectual. The material before the Court does not show whether he has omitted to rejoin the Catholic Church and practise the Catholic faith within six months after the death of the testatrix. If he has omitted to do so, he is entitled to receive only \$500 from the residue of the estate.

I think the judgment of the learned judge in the court below should be set aside, excepting only as to the costs in that court. In place thereof judgment should be entered in the usual form showing, in answer to question no. 1 submitted to the Court, that the condition set forth therein is valid and effectual. On the material presently before the Court no answer can be made to question no. 2. If Emil Starr desires leave to furnish to the Court evidence that he rejoined the Catholic Church and practised the Catholic faith within six months after the death of his mother, he may do so within ten days hereafter. In default thereof it ought to be concluded that he cannot furnish any such evidence, and in that event the answer to question no. 2 submitted to the Court is that Emil Starr is entitled to share in the residue of the estate of Mary Starr deceased to the extent of \$500.

The costs of all parties in this court ought to be paid out of the residue of the estate of Mary Starr, the costs of the executor as between solicitor and client.

ROACH J.A.:—The late Mrs. Mary Starr by her last will and testament devised and bequeathed the whole of her estate to executors and trustees therein named upon certain trusts. The provisions in that will which have given rise to these proceedings are as follows:

Clause (a) "All the rest and residue of my Estate I devise and bequeath to my three children, Isabelle, Julia, and Emil, to be divided equal, share and share alike, and in such proportions or manner as the executors and trustees may see fit and proper."

Clause (b): "I direct my Executors and Trustees, that in the event of the death of my son Emil before my demise, and leaving no children of his own as heirs, then his share shall lapse and be divided equal, share and share alike, between my two daughters, Julia and Isabelle."

Clause (c): "I further direct my Executors and Trustees, that should my son Emil refuse to rejoin the Catholic Church and practice [*sic*] the Catholic Faith within six month[s] after my death, then his share shall also lapse, and be entitled to receive only Five Hundred Dollars (\$500.00), and the balance of his original share shall be divided equally, share and share alike, between my two daughters Isabelle and Julia."

On a motion by the trustee under Rule 600 for the advice of the Court as to whether clause (c) (the identification of the clauses by letters is mine for convenience's sake, they are not so identified in the will) was valid and effectual, Urquhart J. held that the condition contained in that clause was invalid and of no effect, and that Emil Starr was entitled to one-third of the residue absolutely for the following reasons: first, that the condition was a condition subsequent; second, that it was void for uncertainty; and third, that it was repugnant to the absolute gift contained in clause (a).

From that judgment the two daughters now appeal.

It should be observed that the testatrix died on the 4th August 1945. Therefore the six-month period would not expire until 4th February 1946. The son has taken the position all along that the condition is void, and for myself I see no reason why that question should not be legally determined before the expiration of the six-month period. The question which could arise only after the lapse of six months, *viz.*, whether he had or had not "refused", is not now in issue.

I am not in any doubt that the condition in clause (c) is a condition subsequent. That being so, the question of its validity is to be determined by inquiring whether or not it complies with the principle laid down in *Clavering v. Ellison et al.* (1859), 7 H.L. Cas. 707, 11 E.R. 282, as follows: "... where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine." That principle has been applied by the Judicial Committee of the Privy Council in *Sifton v. Sifton et al.*, [1938] A.C. 656, [1938] 3 All E.R. 435, [1938] O.R. 529 (*sub nom. Re Sifton*), [1938] 3 D.L.R. 577, [1938] 2 W.W.R. 465, and by the House of Lords in *Clayton et al. v. Ramsden et al.*, [1943] A.C. 320, [1943] 1 All E.R. 16.

The word "refuse" gives me no difficulty. In the context in which the word is here used it simply means "omit".

Then are there two conditions here imposed, or only one? In my opinion the language used described one composite condition. It does not prescribe a course of conduct to be observed throughout a stated period. Therefore, if at any time within the prescribed period the son should "rejoin" and "practise", the condition would be fulfilled. For myself I cannot conceive it possible that the son could "rejoin" unless at the immediate time of rejoining he "practised" the faith. The one embraces the other.

Supposing that in the eleventh hour of the last day of the sixth month the son professed the Catholic faith and received the sacraments of that Church and immediately died, could it be said that he had omitted to "rejoin" the Catholic Church and "practise" the Catholic faith within the prescribed period? Certainly not. Then, supposing that he should survive that eleventh hour and thereafter should become indifferent or even categorically renounce his allegiance to that faith, could it be said that within the prescribed time he had omitted to "rejoin" and "practise"? Again, I say certainly not.

Counsel for the respondent relied on such cases as *In re Tegg*; *Public Trustee v. Bryant*, [1936] 2 All E.R. 878; *In re Borwick*; *Borwick v. Borwick*, [1933] Ch. 657; *In re Blaiberg*; *Blaiberg et al. v. De Andia Yrarrazaval et al.*, [1940] Ch. 385; *Clayton et al. v. Ramsden et al.*, *supra*, and *In re Donn*; *Donn v. Moses*, [1944]

Ch. 8. In all those cases the language used was quite different from the language which we are here called upon to consider.

In *In re Tegg, supra*, the language in which one of the conditions was expressed was that the beneficiaries "should at all times conform to and be members of the Established Church of England . . ." Speaking of that condition, Farwell J. said, at p. 881:

"In the present case the first condition which is imposed on this lady is that she herself and her children are at all times to conform to and be members of the Established Church of England. It may be—I am not deciding this—that if the testator had been content to say 'should be members of the Established Church of England,' that might be a matter of some certainty, but that is not enough, because the lady and her children must 'at all times conform to'. Now speaking for myself, I do not in the least know what that means. It seems to me it would be quite impossible to say, here and now, whether any particular act or omission would be enough to render this condition operative." Accordingly that learned judge held that condition void for uncertainty.

In *In re Borwick, supra*, the words of the condition were "shall at any time before attaining a vested interest under the trusts hereinbefore declared be or become a Roman Catholic or not be openly or avowedly Protestant." The Court, at p. 668, held that condition void for uncertainty, and in doing so used the following language:

"Again I ask myself, was it possible for a Court on August 31, 1910," (being the date of the settlement) "to see precisely and distinctly what facts and circumstances would make it possible to say of an infant affected by the condition that he had either become a Roman Catholic or was not openly and avowedly Protestant? I answer that question in the negative. I do not think anybody could have said at that date what they were, and I do not think that any two people would have agreed as to what they were, and so, as I have said, I hold the condition bad in law on the ground of uncertainty."

In *In re Blaiberg, supra*, the condition was expressed in the following language: "should any child or grandchild of mine . . . marry any person not of the Jewish faith, such child or grandchild shall forfeit and be deprived of any interest or share under

my said will or codicil thereto. . . ." It was held void for uncertainty.

In *Clayton et al. v. Ramsden et al.*, *supra*, a clause in the will provided that if an unmarried daughter, to whom a legacy and a share of the residue were given, should at any time after the testator's death marry a person "not of Jewish parentage and of the Jewish faith," the provisions in her favour, and in favour of her issue and of any husband, should cease. All the learned law lords agreed that the words "of Jewish parentage" were void for uncertainty. Lord Romer, with whom Lord Atkin and Lord Thankerton agreed, speaking of the words "of the Jewish faith", said this:

"For how is it to be ascertained whether a man is of the Jewish faith? The Court of Appeal answered this question by saying that whether a man was or was not of the Jewish faith was a mere question of fact to be determined on evidence, and that the assertion by the man that he was of that faith was well nigh conclusive. I should agree entirely with the Court of Appeal as to this if only I knew what was the meaning of the words 'of the Jewish faith.' . . . I cannot avoid the conclusion that the question whether a man is of the Jewish faith is a question of degree. The testator has, however, failed to give any indication what degree of faith in the daughter's husband will avoid, and what degree will bring about, a forfeiture of her interest in his estate. In these circumstances the condition requiring that a husband shall be of the Jewish faith would, even if standing alone, be void for uncertainty."

Lord Russell of Killowen, while finding it unnecessary to express an opinion on the certainty of the words "of the Jewish faith", said that had it been necessary he would have felt a difficulty in holding that their meaning was clear or certain. Lord Wright, on the other hand, although he too found it unnecessary to express a final opinion on the words "of the Jewish faith", nevertheless said: "As at present advised, I do not think that they are of insufficient clearness and distinctness . . . I should not be disposed to regard 'Christian faith' as a phrase lacking in clearness and distinctness, and I see no reason in principle why 'Jewish faith' is not sufficiently clear and distinct to identify a specific set of facts to which it may be applied."

In *In re Donn*, *supra* the condition was somewhat similar to that in *Clayton et al. v. Ramsden et al.*, and was held void for uncertainty.

How great is the distinction between the language in all those cases and the language in the case at bar becomes apparent if attention is focused on the word "rejoin"—and, as I have earlier stated, in the circumstances "rejoining" means "practising". To "rejoin" means to link up at the point of separation. The son knew his status at the time of separation. It was not anything doubtful or uncertain. It is the resumption of that status which his mother prescribed as a condition. Here the question of the degree of allegiance or adherence is not left in doubt. He is simply required to resume where he left off. Therefore, the Court "can see from the beginning precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine": *Clavering v. Ellison et al.*, *supra*. His religious status at the time of separation, if needs be measured by degree, is the yardstick by which it can be determined whether or not he has complied with the condition. My opinion is that the condition with which we are here concerned is not void for uncertainty.

Then is it void for repugnancy as cutting down an absolute estate in one-third of the residue given to the son by clause (a)?

There can be no doubt that clause (a), if it stood alone, would constitute an absolute gift to Emil of one-third of the residue, but it would not be right to declare that the will gives him such an absolute gift, if it is made to appear clearly elsewhere in the will that such was not the intention of the testatrix. In that connection the following words of Lord St. Leonards in *Grey et al. v. Pearson et al.* (1857), 6 H.L. Cas. 61, 10 E.R. 1216, are salutary:

"Nobody is more disposed than I am to abide by clear words, and to give them their natural and grammatical meaning; but I never did, and never can come to this conclusion, that the words of a will cannot admit of modification according to the real intention of the testator, as you find it from other expressions, or from the whole context of the will. It is difficult to lay down any abstract rule upon the subject, but where I find the intention and I find words pointing out the intention, and that if I give to the words their simple meaning, according to grammar and according to their plain *prima facie* import, I defeat the intention, I hold that I am bound by every rule, both of law and equity, to see

whether I cannot give to them, by natural construction, an import which will effectuate and not defeat the intention.”

Clauses (a), (b) and (c) should be read together, and from them the intention of the testatrix can be determined with certainty, notwithstanding any poverty of language or awkwardness of expression. I perceive her intention with respect to benefits to Emil to be as follows: that she would place in the hands of her trustee one-third of the residue, subject to the following trusts, namely, that as to \$500 thereof they should hold it in trust for Emil absolutely, to be paid to him in any event; that as to the balance thereof they should hold it in trust for him upon the condition. It is clear that the testatrix did not intend payment of that balance unless and until the condition was fulfilled, and in the event of non-fulfilment, she intended that there should be a gift over of that balance to the two daughters. Once it is determined, as I think it must be, that there was not an absolute gift of one-third of the residue to Emil, the question of repugnancy simply does not arise, and I know of no rule of law that defeats the intention of the testatrix. All that Emil acquired, exclusive of the \$500, was a conditional estate, which may be defeated by non-performance of the condition.

I would, therefore, allow the appeal and direct that the judgment below be set aside and judgment be entered answering question no. 1 submitted by the trustee as follows, namely, that the condition contained in clause (c) is valid and effectual.

As to question no. 2 submitted by the trustee, namely to what extent Emil Starr is entitled to share in the residue, I do not think that the Court can presently answer that question. The answer will depend upon whether or not he has complied with the condition within the prescribed time.

I am conscious of the fact that because question no. 2 is not now answered by the Court the matter is left in an unsatisfactory position so far as the trustee is concerned. In order to wind up this estate, he must satisfy himself as to whether or not Emil has complied with the condition. The following observation may be gratuitous, but I nevertheless make it, namely, that, upon request, Emil should unequivocally state to the trustee whether or not he has complied with the condition within the time limited by the will. If he should state that he has not, that is an end of the matter. If he should state that he has, then he should substantiate

that statement by such evidence in the form of an affidavit or affidavits as he thinks requisite. From that point forward the burden rests on the trustee as to whether or not the proof of compliance with the condition is satisfactory.

I think this is a proper case in which all parties should have their costs of the proceedings below and of this appeal out of the residue, those of the executor on a solicitor and client basis.

Appeal allowed.

Solicitors for the appellants: Day, Ferguson, Wilson & Kelly, Toronto.

Solicitors for Emil Starr, respondent: Hughes, Agar, Thompson & Amys, Toronto.

Solicitors for the executors: McBride & McGibbon, Waterloo.

[COURT OF APPEAL.]

The Township of Harwich v. The Township of Howard.

Drainage—Municipal Drainage Work—Carrying Water into Different Municipality—When “required”—Right of Appeal to Drainage Referee and Court of Appeal—The Municipal Drainage Act, R.S.O. 1937, c. 278, ss. 63, 67, 68.

A municipal engineer made a report proposing to repair and improve an existing drain by diverting the flow into and across an adjoining municipality. An appeal from this report was dismissed by the Drainage Referee, and the adjoining municipality then appealed to the Court of Appeal.

Held, unanimously, there had been a right of appeal to the Drainage Referee under s. 67(2)(b) of The Municipal Drainage Act.

Held further (HOPE J.A. dissenting), the decision of the Drainage Referee was right, and the appeal should be dismissed.

Per HENDERSON J.A.: A judge sitting in the Court of Appeal would require a very strong case to entitle him to differ from the opinions of the engineer and the referee in matters in which they were specially trained and learned, and which they were accustomed to consider.

Per HOGG J.A.: The responsibility for drainage works is vested in the first instance in municipalities, and the Courts should not interfere unless there has been a manifest excess of jurisdiction or disregard of personal rights. *Re Stephens et al. and Township of Moore* (1894), 25 O.R. 600 at 605; *In re Dundas Street Bridges*; *In re Hunter and The City of Toronto* (1904), 8 O.L.R. 52 at 55, applied. The circumstances here established were such that the engineer, acting as agent or servant of the municipality, was entitled to find that the work proposed by him was “required” within the meaning of s. 63 of the Act, in the sense that it was “reasonably necessary”, and nothing was shown to justify interference by the Court.

Per HOPE J.A., dissenting: The word “required” in s. 63 must be interpreted as “necessary”, or “reasonably necessary”, and what was necessary in any case must be determined according to all the circumstances. The statute should not be construed as if the word meant

merely "desirable or preferable", or in such a way as to make the engineer the final judge of whether the work was "required". Where, as was admitted here, other available courses within the confines of the initiating municipality could provide for a suitable outlet, although at greater expense, it could not be said that it was "required" or "necessary" to continue the work into an adjoining municipality.

AN APPEAL by the Township of Harwich from the judgment of the Drainage Referee, dismissing an appeal from an engineer's report, provisionally adopted by the council of the Township of Howard.

14th and 15th February 1946. The appeal was heard by HENDERSON, HOPE and HOGG JJ.A.

J. R. Cartwright, K.C. (Ralph D. Steele with him), for the appellant: A municipality is justified in exercising extra-territorial power, and undertaking works in another municipality, only if it is authorized by statute to do so, and the onus lies on the respondent here to establish that it possesses such power. Section 63 of The Municipal Drainage Act, R.S.O. 1937, c. 278, permits the continuation of a drainage work beyond the initiating municipality only if it is "required" that it be so continued, and the word "required" must mean "reasonably necessary": Proctor, The Drainage Acts, Ontario, 1908, p. 102.

The report here provides for the assessment of lands and roads within the limits of the appellant municipality, which is not authorized by statute. It can at most provide only for the work. The report does not comply with s. 8 of the Act, and is in fact a direct violation of s. 8(1).

The engineer is wrong in his finding of fact that the Hutchison drain has sufficient capacity to carry this additional water. [Counsel for the respondent objected to the raising of this ground of appeal, on the ground that there was no right of appeal to the Drainage Referee on this point.] The right of appeal is not limited by s. 67, which should not be read as restricting an appeal to the cases there mentioned.

It is not "required" to continue the drain into the appellant municipality, as the present course has been used successfully for almost 60 years, and has no turns, as opposed to the many turns in the Hutchison drain, and provides a better outlet, in a shorter distance, than would the proposed extension. In any case, the entire Clark drain is to be maintained, under the report, in its present position.

The ordinary rule is strictly against the exercise of extra-territorial jurisdiction by a municipality: *City of Hamilton v. Township of Barton* (1891), 20 S.C.R. 173. I refer also to *McDougal et al. v. The Township of Harwich*, [1945] O.R. 291 at 300, [1945] 2 D.L.R. 442.

G. W. Mason, K.C. (*W. G. Kerr, K.C.*, with him), for the respondent: The word "required" in s. 63 means "reasonably necessary", and that section gives ample authority for the exercise of extra-territorial jurisdiction with respect to the work here in question. [HENDERSON J.A.: Has there been any decided case as to the meaning of the word "required" in this section?] I think not, but I refer to Proctor, *op. cit.*, pp. 102-3; *In re Township of Raleigh and Township of Harwich* (1899), 26 O.A.R. 313 at 317.

We do not admit that the effect of the Act is that once an outlet has been established in an adjoining municipality there can never be an application for a different outlet.

If "required" is properly construed as "reasonably necessary", then surely that must be further qualified as "reasonably necessary having regard to all the circumstances". We submit that it is reasonably necessary to continue this work as outlined in the report. The element of cost is of great importance: *In re Montgomery et al. and The Township of Raleigh* (1871), 21 U.C.C.P. 381; *In re Huson and The Township of South Norwich* (1892), 19 O.A.R. 343, affirmed (1893), 21 S.C.R. 669.

Under s. 71 of the Act, it is clear that the maintenance of the Hutchison drain will remain entirely within the jurisdiction of the appellant, and it has the right to assess in an equitable way for benefits received.

We refer also to *Township of Euphemia v. Township of Brooke* (1898), 1 C. & S. 358 at 359; *Re Stephens et al. and Township of Moore* (1894), 25 O.R. 600. *McDougal et al. v. The Township of Harwich*, *supra*, has no bearing upon this appeal.

J. R. Cartwright, K.C., in reply: The word "required" means "necessary", or, at most, "reasonably necessary". We submit that the test is whether the Court thinks it necessary, not whether the engineer thinks it so. The statute must first be construed, to determine what the words mean, and it then becomes a question of fact whether or not the proposed works are necessary.

Cur. adv. vult.

13th March 1946. HENDERSON J.A.:—An appeal from the judgment of J. A. McNevin, K.C., Drainage Referee, dated 29th August 1945. The judgment of the Drainage Referee dismissed an appeal of the appellant from the report, plans, specifications, assessments and estimates of W. G. McGeorge, O.L.S., C.E., dated the 3rd October 1944, which contained a plan or scheme for the repair and improvement of the Clark drain in the township of Howard. The report had been read and adopted by the council of the Township of Howard on the 21st October 1944.

I think I cannot do better than to set out the reasons for judgment of the learned Drainage Referee:

“This is an appeal against the report, plans and specifications of W. G. McGeorge, O.L.S., C.E., made pursuant to instructions from the Council of the Township of Howard and dated October 3, 1944. The said report, plans and specifications (Ex. 24-25-26) provide for the repair and improvement of the Clark drain in the township of Howard.

“This report was read and adopted by the Council of the Township of Howard on the 21st day of October 1944.

“On the 26th day of May 1945, in company with the solicitors for the appellant and respondent and Mr. McGeorge and Mr. George A. McCubbin, I inspected the area in question. This included the area drained by the Clark drain, the upper end of the Hutchison drain and the proposed junction of the Clark and Hutchison drains.

“I do not base any findings on my inspection, but this inspection, with explanations made that day, made it much easier to understand the evidence given.

“Before dealing with the matter in dispute, consideration should be given to the two drains referred to in the evidence.

“1. *The Clark Drain.*

“This drain was constructed in 1887 according to a report and plans of Richard Coad, P.L.S. (Ex. 1 and 2). The head of this drain is in lot 19, Town Line Range of the township of Howard. The drain runs in a westerly and south-westerly direction approximately 215 rods to the town line between the townships of Howard and Harwich. It then proceeds along the east side of the said town line a distance of approximately 484 rods, at which point it empties into the McDowell drain (a large drain running in a westerly direction from the township of Howard into the town-

ship of Harwich), at a point where the said McDowell drain crosses the said Town Line.

"The total area thus drained is approximately 700 acres in the township of Howard. Mr. Coad estimated that about 298 acres in the township of Harwich would be benefited by the said work and these lands were assessed for benefit.

"This drain was repaired in 1899 in accordance with the report and plans of Angus Smith, C.E. (Ex. 4 and 5). In addition to cleaning out the upper part of the drain, it provided for the placing of a 12-inch tile in the bottom of that part of the Clark drain along the town line. Some of this tile is still there. There is no tile now at the northerly end of this part of the drain, and there was no evidence produced to indicate whether or not some of this tile was not laid as provided in a report, or whether it was all laid and has since that time been washed out.

"Further repairs were made from time to time, but these were for the most part just cleaning out of the drain and none of these works in any way changed the course of the drain, so that the drain to-day is in the location laid out by Mr. Coad in 1887.

"2. The Hutchison Drain.

"The head of the Hutchison drain is in the south-east half of the north-east half of lot 20, Town Line Range, Harwich, and this lot is directly west of lot 20, Town Line Range in the township of Howard, and is separated from it by the town line only. This drain runs north approximately parallel to the town line across lots 20 and 21, Town Line Range, Harwich, and the next lot to the north known as Lot 24, River Thames Survey, Harwich, and then runs in a north-westerly direction some 5 or 6 miles until it empties into the Fields Creek.

"This drain was constructed according to the report, plan and specifications of Mr. George A. McCubbin,, O.L.S., M.E.I.C. The report was not filed but the plan of the work filed as Ex. 17 and the profile filed as Ex. 18, are both dated July 30, 1937. This scheme provided for the drainage of approximately 1,500 acres all in the township of Harwich.

"It is admitted by the engineers for both the appellant and the respondent, that to-day the Clark drainage area requires better drainage and a proper outlet.

"The report appealed against provides for the cleaning out, etc., of the upper portion of the Clark drain from its head in lot 19 down to the town line.

“Instead of carrying the water northerly along the town line drain to the McDowell drain as at present, the report provides for carrying the water across the town line at a point 3,400 feet north from where the Clark drain enters the town line and then proceeding due west into the township of Harwich about 720 feet to effect a junction with the Hutchison drain. That part of the drain along the town line north from the point where it is proposed to cross the town line would be left as at present (repaired where necessary), and would serve as drainage for lots 22 and 23, Town Line Range, Howard. In the result, water from approximately 500 acres in the township of Howard would be carried across the town line and into the Hutchison drain. In addition the said scheme would provide drainage for 73 acres in the township of Harwich, being parts of lots 19 and 20, Town Line Range, and part of lot 24, River Thames Subdivision, Harwich. The evidence of Mr. McGeorge and Mr. W. D. Colby, O.L.S., C.E., is that the Hutchison drain is the natural outlet for the water from the Clark drain. They say that the natural flow of the water in this area is to the west, *i.e.*, from the township of Howard across the town line into the township of Harwich.

“Mr. Coad, in 1887, had this in mind and his report, Ex. 1, contains the following statement: ‘I find that the water might have been carried off in a westerly direction through Harwich, but as by carrying the water along the town line the present drain of considerable size is made use of to benefit that road and three or four of those low water courses leading west are intercepted for the benefit of the lands in Harwich, I am of opinion that this route by the Town Line road is the best.’

“Against the scheme as set out in the report, two main objections are raised by the appellant. First, that the Hutchison drain is not a proper outlet for the water of the Clark drain. The appellant contends that the Hutchison drain was designed and constructed solely for the purpose of draining the water from 1,500 acres now draining into the Hutchison drain, and that it would be dangerous to add the water from a further 500 acres and would have the effect of rendering the Hutchison drain less effective for the purpose for which it was built. Secondly, that there is no legal right in the Township of Howard now to divert the water from its present course and take it into the township of Harwich and into the Hutchison drain.

"When he undertook this work, Mr. McGeorge was faced with the problem of working out a scheme for the proper drainage of the lands in the Clark drainage area. He says quite candidly that this could have been done in any one of four ways. First, by taking up the present 12-inch tile in the bottom of the drain along the town line and substituting a larger tile with an overflow drain on top. Secondly, by removing the tile and constructing an open drain of sufficient capacity along the town line. Thirdly, by moving the whole drain off the town line on to private property just east of the town line and having the drain run parallel to the town line road. Fourthly, by taking the water across the town line and effecting a junction with the Hutchison drain as set out in his report. For what seemed to him to be good and sufficient reasons, he discarded the first three of these alternatives and adopted the fourth. His reasons, clearly given, show a careful study. He was acquainted with and considered every matter in any way having a bearing on the problem before him. His report has been adopted by the council of the Township of Howard. I think that, as referee, I must be very careful in interfering with matters which, under The Municipal Drainage Act, are vested in the municipal council and its engineers. It is my duty to leave to the municipality and the engineers employed by it, the conduct of all those proceedings and actions vested in them by the Act, and, in my opinion, I should only interfere where I am satisfied there is a lack of jurisdiction or some wrong principle has been applied or that the scheme is against the provisions of the Act and the interpretation of the Act as set out in decided cases. Otherwise this discretion exercised by the engineer and the council must prevail: *Re Stephens et al. and Township of Moore* (1894), 25 O.R. 600.

"The drainage scheme, as outlined by Mr. McGeorge in his report, and the plans and specifications accompanying same, have been approved by Mr. Colby. On the other hand, I am satisfied with the sincerity and honesty of Mr. Geo. A. McCubbin, who opposes the scheme, just as I am satisfied with the sincerity and honesty of Mr. McGeorge and Mr. Colby. They are all engineers of ability, and Mr. McCubbin and Mr. McGeorge have had a long and honoured career as drainage engineers in the Province of Ontario.

"Mr. McCubbin planned the Hutchison drain and designed it effectively to drain the 1,500 acres mentioned in his report, and

he quite naturally views with some alarm the bringing in of the water from 500 additional acres. Mr. McGeorge meets any objections that Mr. McCubbin has raised, by saying that the Hutchison drain was built on generous proportions, and he produces figures which show that this drain would handle the water from the additional 500 acres. His figures indicate that the Hutchison drain would have a run-off capacity of $1\frac{1}{3}$ inches in 24 hours, and this he deems quite sufficient to take care of all the water from the lands now draining into the Hutchison drain and the additional 500 acres from the Clark scheme. Mr. McCubbin quite frankly says that he does not quarrel with Mr. McGeorge's figures as to the capacity of the Hutchison drain. I therefore must find that the Hutchison drain is a sufficient outlet for the waters of the Clark drain.

"I adopt the definition of sufficient outlet given in *Township of Huntley v. Township of March* (1909), 14 O.W.R. 1033, 1 O.W.N. 190, namely: 'The safe discharge of water at a point where it will do no injury to lands and roads.' Mr. McGeorge, an experienced engineer, has found that the Hutchison drain is a sufficient outlet and there is no evidence which would justify my finding to the contrary.

"The second objection of the appellant Township is that the Township of Howard has no legal right to divert the water from its present course and take it into the township of Harwich and into the Hutchison drain. In support of that contention, I have been referred to the unreported case of *Ellis v. North Easthope*. A copy of the judgment of Mr. Geo. F. Henderson, K.C., Drainage Referee, in that case is filed as Ex. 28. I find however the facts in that case are not such that it can be treated as an authority in the present case. As said before, the natural flow of the water is from east to west and the water from the Clark drainage area must ultimately go through the township of Harwich. Mr. Coad, in 1887, appreciated that he had two alternatives: first, to take the water directly west in somewhat the same location as Mr. McGeorge now proposes, or, second, to carry the same north along the town line something more than a mile into the McDowell drain and thence with other water in this drain through the township of Harwich into the Fields Creek. So far as the evidence shows, no work had been done on what is now the Hutchison drain in 1887, and having these two outlets in mind, Mr. Coad

chose the one along the town line, thinking that was the better course because he found a drain of considerable size along the town line which he could use.

"I cannot find that the decision of Mr. Coad, made at that time, followed by the construction of the drain along the town line is forever binding upon the Township of Howard or upon its engineers.

"There is in s. 77 sufficient authority given to engineers to change the course of a drain. I am of the opinion therefore that there was jurisdiction under the Act to change the course of the drain and to take the water into the township of Harwich and into the Hutchison drain, and I find, as a fact, that the Hutchison drain is a sufficient outlet for these waters.

"I therefore hold that the appeal must be dismissed with costs on the Supreme Court scale. The respondent will affix \$4 in stamps to this report, as provided in s. 114, and these may be taxed against the appellant. All costs of the appellant will be charged against the Hutchison drainage area.

"Dated at Chatham, Ontario, this 29th day of August, 1945.

"J. A. McNevin,

"Referee."

It was said that the learned referee is in error with regard to the date of construction of the Hutchison drain, which he puts at 30th July 1937, and it is said it was constructed much earlier, and that this was the date of a work of repair. I find myself in entire concurrence with the learned referee's statement of facts and with his conclusions, which, I think, are fully supported by the evidence.

The grounds upon which the appeal of the appellant was taken to the learned referee are as follows:

(a) that the Township of Howard should not be permitted to do the work provided for, within the limits of the township of Harwich;

(b) that the assessment against lands and roads within the township of Harwich is illegal, unjust and excessive;

(c) that the Township of Harwich objects to paying its proportion of the cost of the work provided for to the treasurer of the Township of Howard.

The provisions of The Municipal Drainage Act, R.S.O. 1937, c. 278, with respect to appeal, are found in ss. 67 and 68.

Section 67(1) provides for an appeal to the Drainage Referee by a written notice setting forth the reasons for such appeal. Subs. (2) (a) provides:

“(2) The reasons of appeal which shall be set out in such notice may be the following or any of them:

“(a) where the assessment against the appealing municipality exceeds \$1,000, or exceeds the estimated cost of the work in the initiating municipality,—

“(i) that the scheme of the drainage work as it affects the appealing municipality should be abandoned or modified, on grounds to be stated;

“(ii) that such scheme does not provide for a sufficient outlet;

“(iii) that the course of the drainage work, or any part thereof, should be altered;

“(iv) that the drainage work should be carried to an outlet in the initiating municipality or elsewhere.”

It is conceded that there is no appeal under these provisions because the assessment against the appealing municipality does not exceed \$1,000 and does not exceed the estimated costs of the work in the initiating municipality.

Section 67(2) (b) provides as follows:

“(b) in any case not otherwise provided for,

“(i) that a petition has been received by the council of the appealing municipality, as provided by section 2, from the majority of the owners within the area described in the petition, praying for the enlargement by the appealing municipality of any part of the drainage work lying within its limits, and thence to an outlet, and that the council is of opinion that such enlargement is desirable to afford drainage facilities for the area described in the petition.

“(ii) that such appealing municipality objects to paying over its proportion of the cost of the work to the treasurer of the initiating municipality;

“(iii) that the initiating municipality should not be permitted to do the work within the limits of the appealing municipality;

“(iv) that the assessment against lands and roads within the limits of the appealing municipality and roads under its jurisdiction is illegal, unjust or excessive”.

The appeal to the referee must therefore be taken under the provisions of s. 67(2) (b).

It will be observed that the notice of appeal to the learned referee does not suggest any petition under subs. 2(b) (i) but in its clauses (a), (b) and (c) it covers the three grounds in subs. 2(b) (ii), (iii) and (iv). I do not find any evidence to support the allegation lettered (b) in the notice of appeal to the referee, nor do I find any evidence to support the ground lettered (c) in such notice of appeal, so that the issue really raised was simply that the Township of Howard should not be permitted to do the work provided for within the limits of the township of Harwich.

Section 68(1) sets forth the powers of the referee upon an appeal, who is to hear and adjudicate upon all questions raised by the notice of appeal, etc., and by subs. (2) the order of the referee upon such appeal is subject to appeal to the Court of Appeal as in other cases, the decision of that Court being final and conclusive.

The reasons set out in the notice of appeal to this Court are as follows:

(a) that the township of Howard has no right to divert the Clark drain into or through the township of Harwich.

(b) that the report, plans, specifications, assessments and estimates of the said W. G. McGeorge are defective in failing to make proper provision for diverting the said Clark drain through the Hutchison drain;

(c) that the report of the Drainage Referee is contrary to the evidence and the weight of evidence.

It is to be observed that the present notice of appeal does not set up either item (b) or (c) of the previous appeal; that item (b) of the present appeal is not set up in the previous appeal; but that item (a) in each appeal may relate to the same subject matter.

The substantial matter upon which the argument before us turned is upon the construction of s. 63, because, in my opinion, the only real question remaining to be determined is the proper construction of the opening sentence of that section. My opinion, from what I have recited in the foregoing pages, is that the right of appeal is very much limited, and that the only ground surviving to the appellant upon this appeal is that to which I now refer.

Section 63 is as follows:

“Where it is required to continue any drainage work beyond the limits of the municipality, the engineer or surveyor employed by the council of such municipality may continue the work on or along or across any allowance for road or other boundary between any two or more municipalities, and from any such road allowance or other boundary into or through any municipality until he reaches a sufficient outlet, and in every such case he may assess and charge regardless of municipal boundaries, all lands and roads to be affected by benefit, outlet or relief, with such proportion of the cost of the work as to him may seem just, and in his report thereon he shall estimate separately the cost of the work within each municipality and upon the road allowances or other boundaries.”

Mr. Cartwright argued for the appellant that the opening words of this section are to be construed as meaning “reasonably necessary”.

We were referred to the case of *In re Township of Raleigh and Township of Harwich* (1899), 26 O.A.R. 313, 2 C. & S. 12, and particularly to the following words of Osler J.A. at pp. 317-8:

“Where an extensive scheme is proposed to be undertaken by one township, involving work, not merely of repair but repair and improvement, to be done by them in an adjoining township, the onus of supporting the scheme is cast largely upon the township which propounds it. It is bound to make out that it is reasonably necessary, and that it is, so far as it can be made so, complete in itself, and one which is not likely to involve the initiation of a new work by the latter township in order to relieve itself from the waters which the other will bring down upon it.”

The point decided in that case, and the only point of the decision, was that the engineer did not make provision for a sufficient outlet for the water dealt with. I would further point out that the words of the learned judge relate to an extensive scheme.

In construing the section, one is moved to ask, who is to decide “where it is required”? This is to be determined in the first instance, in my opinion, by the engineer, and in the present case the engineer has determined that question and his decision is supported by the learned Drainage Referee. I am of opinion that the words “where it is required” are to be construed as meaning where

the plan or scheme proposed by the engineer requires that the work be continued to an outlet in an adjoining municipality.

As to the merits of the plan, as already said I concur in the views of the engineer, Mr. McGeorge, and the learned referee, but in any case I should think a judge sitting in the Court of Appeal on a matter of this kind would require to have a very strong case to entitle him to differ from their opinions in matters in which they are specially trained and learned, and accustomed to consider.

The scheme is not a large one at all, and there are very cogent reasons advanced by the engineer and by the referee in its support. The criticism of it is by Mr. McCubbin, an engineer of standing and integrity, as certified by the learned referee, but to my mind his criticisms lose their force in view of his evidence that his objection really is that the distribution of the cost is inequitable, and that he would not object to the plan if the terms were equitable. Mr. McCubbin appears to err in his point of view, inasmuch as he suggests that the plan should make provision for a contribution to the cost of the Hutchison drain, losing sight of the fact that if, as he suggests, any additional work becomes necessary in connection with the Hutchison drain by reason of the plan in question, the jurisdiction is entirely in the township of Harwich to provide for the work and for assessing the cost equitably upon lands in the township of Howard as well as those in the township of Harwich.

It was strongly argued that because the Clark drain has been in existence for many years and has an outlet in the township of Howard, it is not "required" to continue this drainage work into the township of Harwich. There is evidence that the present outlet of the Clark drain into the McDowell drain is a sufficient outlet *qua* outlet, but there is ample evidence that the Clark drain has never been an effective drain because it does not and cannot bring the water to the outlet, which is, I should think, a very serious defect in a drain, with the result, indeed, that the lands supposed to be drained in the upper reaches of the Clark drain have never been effectively drained.

I am not prepared to construe s. 63 as meaning that if there is an outlet in the initiating township the water must be taken to that outlet irrespective of convenience, cost, etc. The evidence is quite clear that the natural drainage of the water which will be drained by the Clark drain into the Hutchison drain is into the

township of Harwich, and that the effect of the Clark drain has been to divert that water from its natural course into Harwich township and take it along the Town Line Road in Howard township.

It was urged, in argument, although not set out in the grounds of appeal, that the engineer failed to make provision for a bridge or culvert across the Town Line Road. This appears in his report, and he says it is for the reason that the necessary bridge or culvert will be provided by the County of Kent, as the Town Line Road is and has been for many years a county road. This is a small matter, which, in my opinion, cannot be permitted to invalidate the report. It would appear to me that there will be no practical difficulty.

I am therefore of opinion that the appeal fails and must be dismissed with costs.

HOPE J.A. (*dissenting*): A preliminary objection to this appeal was raised by the respondent's counsel, *viz.*, that the appellant had possessed no right of appeal to the referee from the report of the engineer within the provisions of s. 67 of The Municipal Drainage Act, R.S.O. 1937, c. 278. Counsel for the respondent relied particularly on the argument that the appellant did not come within the ground of appeal set out in subs. (2) (a) (i). The notice of appeal to the referee, in strict compliance with the provisions of s. 67(1), sets forth the reasons for the appeal. Reference to the notice of such appeal to the referee clearly indicates that the first, second and third grounds thereof were set out in the precise language of s. 67(2) (b) (iii), (iv) and (ii) respectively.

It is abundantly clear, in my opinion, that where the ground or grounds of appeal fall within para. (b) of subs. (2), or any of its sub-paragraphs (i) to (iv) inclusive, it is not incumbent upon the appellant to bring the ground or grounds of his appeal also within the terms of para. (a) of the same subsection.

Since the appellant relies not on para. (a) but on para. (b), and in particular (iii) thereof, it is not essential that consideration be given herein to the argument of the appellant's counsel that the appellant is not restricted to the various grounds specified in s. 67(2)—in other words that when s. 67(2) states "The reasons of appeal which shall be set out in such notice may be [in]

the following [terms] or any of them;" the use of the word "may" indicates that the enumerated grounds are purely permissive and illustrative but not restrictive.

The respondent's preliminary objection, which would have struck, of course, at the root of the appeal at bar, fails: *vide Re Township of Aldborough and Township of Dunwich* (1904), 4 O.W.R. 159.

The referee dismissed the appeal from the engineer's report, and the appellant now appeals to this Court therefrom on the following grounds, as set forth in the notice of appeal hereto, *viz.*:

"among other grounds:

"(a) That the Respondent has no right to divert the Clark Drain into or through land in the Township of Harwich;

"(b) That the Report, plans, specifications, easements and assessments of W. G. McGeorge, O.L.S., C.E., are defective in that they fail to make proper provision for diverting such Clark Drain across the Town Line Road between the Township of Harwich and the Township of Howard through the Hutchison Drain.

"(3) That the Report of the learned Drainage Referee is contrary to the evidence and the weight of evidence."

The foregoing ground (b) refers, I understand, to the failure of the engineer's report to provide by way of direction and assessment for the construction of the culverts and road-work where it is proposed to divert the Clark drain, traversing it across the township boundary road, now a county road. The engineer states that this was not covered by his report since he had the assurance of the county engineer that the County would assume responsibility for it. This acceptance by the county engineer of the County's responsibility is not in any way binding upon the County as an assessment or direction, but could be cured by referring the report back to the engineer for amendment. It was not seriously argued that this was necessary, and I do not consider that the matter should be relied upon as a ground of appeal.

The grounds of appeal in the notice of appeal to this Court are not in the precise statutory language as are the grounds therefor set out in the appeal to the learned referee. However, the first and third grounds for appeal to this Court by implication in my opinion embody the statutory grounds of the earlier notice of appeal.

The appellant in support of the first ground of appeal hereto, *viz.*, that the respondent has no right to divert the Clark drain in-

to or through land in the township of Harwich, relies upon the statutory provision of s. 63 of the Act.

Sections 60, 61 and 62 of the Act are preceded by the heading or sub-title "Work not continued into another municipality".

The two following sections, 63 and 64 are entitled "Work continued into another municipality."

As is stated in Craies' Statute Law, 4th ed. 1936, pp. 188-9, quoting Channell B., in *The Eastern Counties, etc., Railway Companies v. Marriage* (1860), 9 H.L. Cas. 32, 11 E.R. 639:

"They [the headings] constitute an important part of the Act itself, and may be read not only as explaining the sections which immediately follow them . . . but as affording a better key to the construction of the sections which follow them. . . ."

It is abundantly clear that aside from any statutory provisions a municipality has no extra-territorial jurisdiction. In drainage works, this extra-territorial jurisdiction is given in varying degrees in two distinct sets of circumstances, firstly under s. 60 of the Act, "Where any drainage work is not continued into any other than the initiating municipality" in which circumstances by s. 62 the municipality is authorized to enter upon and construct upon the road allowance between the initiating municipality and an adjoining municipality where it is necessary to construct any drainage work; and secondly under s. 63, "Where it is required to continue any drainage work beyond the limits of the municipality", in which circumstances the engineer employed by the council of such municipality may continue the work into or through any municipality until he reaches a sufficient outlet.

In this connection it should be noted that by s. 60(2) drainage work is not to be deemed continued into a municipality merely by reason of being constructed in whole or in part on a boundary road allowance.

The present engineer's report proposes to continue the Clark drain into the appellant township under the authority of this s. 63 on the apparent assumption that it is required so to continue the drainage work.

The appellant's counsel argued that the words "Where it is required" in s. 63 must be interpreted as "where it is necessary", and pointed out that the same is not necessary even in the opinion of the engineer, who offers three other alternative plans, all of which would not enter the appellant township. True, the en-

gineer, after reviewing all four schemes, expresses his opinion that the one proposed is the preferable one. In argument, the appellant's counsel was prepared to concede that "necessary" should be at all times qualified as "reasonably necessary". With this I quite agree, as I do also with the argument of the respondent's counsel that "necessary" must be as applicable to the particular circumstances existent in each case. These two contentions are not in conflict, but are wholly complementary.

Counsel for the respondent contended in effect that "where it is required" must be construed in the sense of "where it is desirable or preferable", and that such must be governed solely by the opinion of the engineer, whose decision is final.

With this latter contention I am unable to agree. In both ss. 61 and 62 the phrase used to prescribe an antecedent condition governing certain authorized actions is the phrase "where it is necessary". This is the sense in which "required" is employed in s. 63.

In the Shorter Oxford English Dictionary, under the various uses and definitions of the verb "require", there appears, as the apt one hereto, the illustration of the use of the transitive verb in the present tense thus: "It requires" as meaning "there is need of", and as an intransitive verb as "to be requisite or necessary".

Similarly in Murray's New English Dictionary.

Funk & Wagnall's Standard Dictionary defines "require" as "1. To demand, or to request something of, authoritatively; ask as of right; claim; insist upon. 2. To have imperative need of; render or find indispensable"; and also: "1. To be requisite. 2. To feel under a necessity to do something", and defines "requisite" as "Required by the nature of things or by circumstances; necessary; indispensable."

In Roget's Thesaurus, the word "required" is defined as "requisite, needful, necessary, imperative, essential, indispensable, called for."

In *Gibbon v. Phillips* (1894), 64 L.J.M.C. 42, Wills J., in an appeal involving the construction of a phrase under the Coal Mine Regulations regarding the use of sprags or props in coal mines held that the words "where they are required" clearly meant "where they are 'necessary', and not where the workmen think they are necessary."

The second rule for the interpretation of words in statutes, as cited in Craies, *op. cit.*, at p. 153, is as put by Bowen L.J., in *Wandsworth Board of Works v. The United Telephone Company Limited* (1884), 13 Q.B.D. 904 at 920, *viz.*, “. . . that if a word in its popular sense, and read in an ordinary way, is capable of two constructions, it is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act, and not to give any unnecessary powers.”

To ascribe to “required” the meaning advanced by the respondent would undoubtedly confer on the engineer wide powers, exercisable without review, when in his opinion one course was preferable or desirable, even though the objects of the Act could be achieved within the initiating municipality.

In my opinion, the use of the word “necessary” in s. 62 lends force to the appellant’s argument that the same meaning is to be ascribed to “required” in s. 63. If it were not so, then there would exist the anomalous situation that in entering a municipality other than the initiating one, an engineer would possess a wider and more arbitrary power, based on his own preference rather than the needs of the situation, than he would possess by statute within the initiating municipality only.

In this connection, I think the words of Osler J.A., in *In re Township of Raleigh and Township of Harwich* (1899), 26 O.A.R. 313 at 317-8, 2 C. & S. 12, are particularly pertinent, *viz.*:

“Where an extensive scheme is proposed to be undertaken by one township, involving work, not merely of repair but repair and improvement, to be done by them in an adjoining township, the onus of supporting the scheme is cast largely upon the township which propounds it. It is bound to make out that it is reasonably necessary, and that it is, so far as it can be made so, complete in itself, and one which is not likely to involve the initiation of a new work by the latter township in order to relieve itself from the waters which the other will bring down upon it.”

In some sections of The Municipal Drainage Act, by specific provision, the opinion of the engineer is made the sole arbiter, *e.g.*, ss. 60(1) and 64. But this is not contained in s. 63, nor do I think it can be reasonably read into it. Where other available courses within the confines of the initiating municipality can provide for a suitable outlet, as is admitted by the engineer in his

evidence, it is not "required" or "necessary" to continue the drainage as essential or indispensable work into an adjoining municipality, and it is not open within the statute for the engineer to do so simply because in his opinion such is the preferable course to follow. Nor, in my opinion, is the question of "where it is required" one to be determined finally or conclusively by the engineer, without review by either the referee or this Court on appeal: *vide Gibbon v. Phillips, supra*, where it was held that the determination of whether or not a matter was "required" was a question for review by the Court. That the matter is not solely one to be determined by the opinion of the engineer but subject to review by the referee and the Court is amply borne out by the words of Osler J.A., cited *supra*. If the Township "is bound to make out that it is reasonably necessary", it cannot be said to rest entirely in the opinion of the engineer.

On this ground alone (which is the only one I have discussed), in my opinion the appeal must be allowed and the report referred to the engineer for such amendment as may carry out one or other of the alternative schemes which do not require the drainage work to be continued into the appellant township.

Costs here and below to the appellant.

HOGG J.A.:—The determination of the issues raised by the matter which is the subject of this appeal rests in no small degree upon a consideration of the rights and powers given to municipalities by The Municipal Drainage Act, R.S.O. 1937, c. 278, as amended.

It may be not only of interest, but of value, in arriving at the answer to the problem which has been placed before the Court for solution in this appeal, to consider the principle which has been held to be the governing one with respect to the object and purpose of the statute. The construction of drainage works, and the powers incidental thereto, have been entrusted by the Act almost exclusively to the local municipalities affected thereby.

Chancellor Boyd, in his judgment in *Re Stephens et al. and Township of Moore* (1894), 25 O.R. 600 at 605, expressed this conception in the following language:

"In matters of drainage and other business of local concern the policy of the legislature is to leave the management largely in the hands of the localities, and the Court should be careful to refrain from interference—the meaning of which is always a large

outlay for costs—unless there has been a manifest and indisputable excess of jurisdiction or an undoubted disregard of personal rights.”

In *In re Dundas Street Bridges; In re Hunter and The City of Toronto* (1904), 8 O.L.R. 52, Meredith J., in speaking of certain local improvement clauses of The Municipal Act, laid down a method of approach to that legislation which I think may properly be applied to a consideration of The Municipal Drainage Act. He said, at p. 55:

“It is always to be borne in mind that these local improvement clauses are to be considered remedial legislation, and are to receive such large and liberal construction as will best attain the object of the enactment. They are to be worked out by that plain class of laymen which usually fills municipal office of township, town, and village, as well as of city. They are not to be the subject of expert hair splitting, nor to stand or fall upon very precise literary criticism, nor upon any Judge’s or any court’s notion of what is fair or unfair, beneficent or the opposite, to the taxpayer.”

I am of the opinion that a right of appeal exists by virtue of the provisions of s. 67(2)(b) of the statute. The grounds of appeal are set out in the reasons for judgment of my brothers Henderson and Hope, which I have had the privilege of reading.

Such observations as I desire to make are solely with respect to s. 63 of the Act, which provides for the continuation of a drainage work beyond the limits of a municipality. The exercise of such right or powers is conditional upon the opening words of the section, namely:

“Where it is required to continue any drainage work beyond the limits of the municipality, the engineer or surveyor employed by the council of such municipality may continue the work on or along or across any allowance for road or other boundary between any two or more municipalities, and from any such road allowance or other boundary into or through any municipality until he reaches a sufficient outlet.”

The true and proper meaning to be given to the word “required”, as it stands in this section, presents a matter of some difficulty. Counsel for the appellant argued that “required” should be interpreted as “necessary” or “reasonably necessary”. I am not inclined to quarrel with this definition. I think that the

meaning placed upon this word by the Courts where it appears in a statute which is *in pari materia* may be helpful to some degree, but its interpretation must depend upon the circumstances present in each separate case.

In *The Attorney-General v. Walker* (1849), 3 Ex. 242, 154 E.R. 833, the words "necessarily required" in a statute dealing with the drainage of lands, as applied to certain works, were held to mean "physically necessary" or "reasonably used with reference to physical necessity." Pollock C.B. was of the opinion that the words did not mean "absolutely necessary" but "reasonably necessary with reference to the circumstances of the particular case."

In *Errington v. Metropolitan District Railway Company* (1882), 19 Ch. D. 559, where a railway company was empowered by statute to take such lands "as may be required" for their undertaking, although that statute did not deal with a subject of the same character as that now under discussion, these words were held to mean such lands as the company might fairly think convenient for its purpose or for its advantage, and it was held that the word "required" in this connection did not mean "absolutely necessary". It was said that the opinion of the railway company was the governing factor.

Two questions present themselves: Why is it required to carry the drainage work into another municipality, and who is to determine whether such step is required?

Having regard to the nature and object of the statute, and the admonition of Boyd C. in the *Stephens* case, I think we must look to all the circumstances material to, and affecting, the proposed drainage work, in determining what the word "required", as used in this section of the statute, means. Certain physical conditions must be present as a primary element, and there is no dispute between the parties that conditions exist which require, or show the necessity for, an improved drainage work. There is evidence that the Clark drain, without further work being done upon it, is inadequate. As to some of the other existing circumstances, there is evidence that if the use of the Clark drain is to be continued, it should be made wider and deeper, which would entail considerable expense in maintenance as well as that of construction. There is also evidence that it would be more satisfactory that the Clark drain be moved back from the roadway because of

its near proximity having an injurious effect upon the road and the frequent need of repairs. This plan would be more expensive than the plan under consideration. There is the further evidence that if the Clark drain were to be improved by using larger tile the cost would be excessive. These factors are all elements that are, in my view, relative to, and embraced in, the term "required" in s. 63 of the Act, and are circumstances from which it can be considered whether it is "reasonably necessary" that the drainage work be diverted across the border between the two townships, and the Clark drain be connected with the Hutchison drain, rather than that the Clark drain be repaired and improved.

There remains the further question, who is to determine that "it is required to continue" the drainage work beyond the limits of the municipality? Some particular person or body of persons must decide what is to be done. The matter is one for the municipality, which can act only through its servants, employees or agents, and the logical and reasonable instrument to be employed by the municipality to act on its behalf in the matter is the engineer.

I cannot conclude that in the carrying out of the report there will be caused—to quote again the words of Chancellor Boyd, "a manifest and indisputable excess of jurisdiction or an undoubted disregard of personal rights." In planning the work and in the preparation of the report, I do not think any principle that should be followed has been disregarded, nor anything done which would warrant this Court, in its review of the matter, to interfere with the project as designed by the engineer.

I agree with the disposition of the appeal made by Mr. Justice Henderson.

Appeal dismissed with costs, HOPE J.A. dissenting.

Solicitor for the appellant: Ralph D. Steele, Chatham.

Solicitor for the respondent: W. George Kerr, Chatham.

[McRUER C.J.H.C.]

Re Woods.

Wills—Life Estate with Power of Appointment, and Remainder, in Default of Appointment, to Heirs of Life Tenant—Application of Rule in Shelley's Case to Personalty—Provisions excluding Application of Rule—Restraint on Alienation during Coverture.

A testator left shares of his estate to his trustees for the benefit of his daughters, providing that in the case of each of such shares the principal was to be retained by the trustees and the income was to be paid to the daughter "free from the control of any husband with whom she may intermarry and subject to restraint upon alienation during coverture", and that after her death the principal should be paid to such persons as she should by deed or will appoint, and, in default of appointment, "to her right heirs".

Held, the rule in *Shelley's Case* (1581), 1 Co. Rep. 93b, did not operate so as to vest an absolute estate in each daughter. The restraint on alienation had the effect that the full enjoyment of an absolute life interest was not given to the daughter during coverture, and there was therefore not that co-existence of estates amounting in the aggregate to an absolute estate which was required for the application of the rule. *Van Grutten v. Foxwell et al.*, [1897] A.C. 658; *The London Chartered Bank of Australia v. Lemprière et al.* (1873), L.R. 4 P.C. 572; *Barford v. Street* (1809), 16 Ves. 135, considered; other authorities referred to.

A MOTION for the opinion of the Court.

7th February 1946. The motion was heard by McRUER C.J.H.C. in Weekly Court at Toronto.

J. T. Garrow, for the executors and trustees.

H. F. Parkinson, K.C., for Ida Evelyn Booth.

G. E. Burson, for the estate of Margaret C. Woods Browne, deceased.

H. C. Walker, K.C., for George Sackville Browne.

P. D. Wilson, K.C., Official Guardian for the infant children of Margaret C. Woods Browne.

15th March 1946. McRUER C.J.H.C.:—This is an application for the opinion of the Court construing the will of Lieutenant-Colonel James William Woods, deceased, late of the city of Ottawa, who died on or about the 20th day of December, in the year 1930.

Several questions were propounded for the opinion of the Court, but on the argument it was agreed that the present application should be confined to question 1(a), which reads as follows:

"1. Whether upon the true construction of the Woods Will the meaning and effect of paragraph (g) of Clause 7 thereof is—

(a) that the share of the testator's estate in which each of his daughters took an interest under said paragraph (g) vested in each daughter absolutely at the death of the testator".

Upon this question being answered, counsel will then consider to what extent the advice of the Court may be required on the remaining questions set out in the notice of motion.

The testator left a considerable estate, which was disposed of in a carefully drawn will for the primary benefit of his widow and children. He was survived by his wife Evelyn Edwards Woods, now deceased, and his two sons, Shirley E. Woods and James W. Woods, Jr., and two daughters, Margaret C. Woods Browne (now deceased) and Ida Evelyn Booth. The testator's daughters were married women at the date of his death. Margaret C. Browne died a married woman on the 9th March 1941. The marriage of Ida Evelyn Booth was dissolved by a judgment of the Supreme Court of Ontario dated the 11th December 1937, and she is now unmarried.

The Royal Trust Company and the testator's two sons, Shirley E. Woods and James W. Woods, Jr., were named as executors and trustees of the last will and testament of the deceased, and probate was granted to them on the 10th March 1931.

After making provision for debts, succession duties, and certain specific legacies, the will provides:

"ALL THE REST, residue and remainder of my estate movable and immovable, real and personal, I GIVE, DEVISE AND BEQUEATH to my Executors and Trustees upon the trusts hereinafter set forth."

Then follow detailed alternative provisions for the widow, in case she did or did not elect to take under a certain marriage settlement (she elected to take under the marriage settlement), and for sons and daughters, many of which provisions are not in question on this motion.

The shares of the daughters were, however, subject to para. 7(g) of the will, which reads as follows:

"(g) In the case of each of my daughters my said Executors and Trustees shall retain the principal of her share and shall pay the income thereof to my daughter free from the control of any husband with whom she may intermarry and subject to restraint upon alienation during coverture, and after her death, shall pay the said principal to such person or persons in such

amount or amounts at such time or times and in such manner and subject to such limitations and conditions as she shall by Deed or Will appoint, and in default of appointment to her right heirs."

In construing this paragraph it is important to observe that throughout the will the intention of the testator was to provide a measure of security for his wife and children, and that, as far as his daughters were concerned, neither of them might be deprived of the measure of security provided by the importunities of their respective husbands or any other person.

Whatever may be the legal effect of the words used by the testator in the clause in question, it is clear from the whole will that the intention was:

(a) that the trustees should retain in their hands the corpus of each daughter's share during her lifetime;

(b) that the income only from the respective shares should be paid to each daughter during her lifetime;

(c) that on the death of either daughter, her respective share should be paid over by the trustees to such person as she should by deed or will appoint;

(d) that in default of appointment by deed or will the respective shares should be paid over to those persons who would, by the process of law, become entitled thereto, and

(e) that the income from each daughter's share should be entirely free from the control or influence of her husband, and during coverture neither daughter was to have power to denude herself of her life interest by alienation.

While the intention of the testator was not disputed on the argument, it was argued, however, that this is one of those cases where the intention of the testator is defeated by the rule in *Shelley's Case* (1581), 1 Co. Rep. 93b, 76 E.R. 206.

It is agreed that all the property here in question is personalty, and in order to decide what application the rule in *Shelley's Case* may have to this will, it is first necessary to decide what was the nature of the gift to the daughters, and what is the proper construction to be put on the words "rights heirs". The gift to the daughters was a gift of income for life, with a limitation that restrained them from dealing with it during coverture. There is no difference between a restraint on anticipation and a restraint on alienation: *In re Currey; Gibson v. Way* (1886), 32 Ch. D. 361, per Chitty J. at pp. 364-5.

For the purpose of construing this will, I am prepared to assume that the words "right heirs", as used in the will, mean those persons who, by the law of the domicile at the date of the death of the respective daughters, would be entitled to inherit.

In view of the conclusions that I have come to on another branch of the case, it is not necessary for me to consider the difference in meaning attached to the word "heir" under the law of the Province of Ontario, and the word "heir" as used in the Civil Code of the Province of Quebec, the Province of the domicile at the date of the death of Margaret C. Woods Browne.

Four alternative propositions were submitted to the Court for consideration:

1. The two daughters took an absolute vested interest on the death of the testator.

2. The estate did not vest absolutely in the daughters and there was no valid exercise of the power of appointment. Therefore, the deceased daughter's share passed to her next-of-kin as "right heirs".

3. There was no vesting but the deceased daughter's will constituted a good exercise of the power of appointment.

4. The power of appointment may be good in part and not good in part.

The first proposition is the only one that I am called upon to deal with at present.

There is no doubt that the rule in *Shelley's Case* is applicable to gifts of personalty: *Comfort v. Brown* (1878), 10 Ch. D. 146.

The precise question that arises in this will is whether the restriction on alienation during coverture takes the case out of the application of the rule. In order properly to determine this, it is necessary to have a clear view of the well-defined principles to be applied.

For the purposes of this case I prefer the statement of the rule as expressed by Lord Davey in *Van Grutten v. Foxwell*, [1897] A.C. 658 at 684:

" . . . wherever an estate for life is given to the ancestor or propositus, and a subsequent gift is made to take effect after his death, in such terms as to embrace, according to the ordinary principles of construction, the whole series of his heirs, or heirs of his body, or heirs male of his body, or whole inheritable issue taking in a course of succession, the law requires that the heirs,

or heirs male of the body, or issue shall take by descent, and will not permit them to take by purchase, notwithstanding any expression of intention to the contrary. Wherever, therefore, the Court comes to the conclusion that the gift over includes the whole line of heirs, general or special, the rule at once applies, and an estate of inheritance is executed in the ancestor or tenant for life, even though the testator has expressly declared that the ancestor shall take for life and no longer, or has endeavoured to graft upon the words of gift to the heirs, or heirs of the body, additions, conditions, or limitations which are repugnant to an estate of inheritance, and such as the law cannot give effect to. The rule, I repeat, is not one of construction, and, indeed, usually overrides and defeats the expressed intention of the testator."

In this case the deceased daughter died without making any appointment by deed. No power of appointment has been exercised by the living daughter. The premises for the application of the rule in *Shelley's Case* would require that there exist in the daughters a complete equitable life interest and in those who would in the due course of law take by descent in default of appointment a complete equitable interest in remainder.

In such a case there would be a coalescence or merger of interest, so as to vest in each daughter an absolute equitable vested interest. However, I have been unable to find, in the legion of decided cases dealing with the rule in *Shelley's Case* in the English courts, authority for the proposition that where on a careful reading of the whole will there appears to be in the ancestor something less than a complete life interest, coalescence or merger can take place so as to vest in the ancestor an absolute interest.

As I read the cases, the absolute interest must arise under the testator's will by vesting in the ancestor and his heirs or next-of-kin those interests that in the aggregate amount to an absolute interest, or in the alternative a power the exercise of which would vest in the ancestor such aggregate interests. Simple examples are the cases where a life estate is given, with remainder to the heirs of the life tenant, or a life estate is given, with power to appoint by will or deed, with remainder to the heirs of the holder of the life estate, or a life estate is given, with power of appointment by will or deed, with remainder to other parties, and the holder of the life interest has exercised the power in his own favour.

In this case, the testator did not, by his will, vest in the daughters a complete life interest in the shares in question. The shares were given to the trustees and the income only was payable to the daughters, without power of alienation during coverture. They were restricted by the very terms of the gift from full enjoyment of an absolute life interest during coverture. Had the subject of the gift been real property, beyond question the daughters could not have disposed of their life estate during coverture. That being true, I cannot see how the rule in *Shelley's Case* can be applied to defeat the express terms of the trust imposed upon the trustees.

It is clear that neither of the daughters could, during coverture, assign or transfer her life interest, for instance, to secure the debts of a husband. It would be a manifest breach of this intention if, by an application of the rule in *Shelley's Case*, a daughter could transfer the whole estate to her husband for the same purpose. I am mindful of what was said by Lord Macnaghten in *Van Grutten v. Foxwell*, *supra*, at p. 672:

" . . . the rule in *Shelley's Case* is a rule of law—'inflexible', as it was termed by one of the noble Lords who spoke in the subsequent case of *Roddy v. Fitzgerald* [(1858), 6 H.L. Cas. 823, 10 E.R. 1518], operating invariably, and, so to speak, automatically whenever the limitations are such as to call for its application", but I am equally mindful of the fact that the rule in *Shelley's Case*, being a rule of law and not a rule of construction, is not to be applied unless there is legal authority for its application. While I have not been able to find, in any case in the English courts dealing with the rule, legal authority for its application to the facts of this case, there is language in cases that suggests that it is not applicable. In *The London Chartered Bank of Australia v. Lemprière et al.* (1873), L.R. 4 P.C. 572, Lord Justice James, at p. 595, says of the deed there in question:

"In the present case it is to be noted, that the gift is to the married woman for her separate use for life, with remainder, as she should, notwithstanding her coverture, by Deed or Will appoint, with remainder to her Executors or Administrators. Their Lordships are satisfied, that on the weight of authority and on principle they ought to treat this as what in common sense, and to common apprehension, it would be, an absolute gift to the sole and separate use of the Lady. The words are an expansion and expression of what would be implied in the word

'sole and separate use'; and they conceive themselves at liberty to hold that such a form of gift to a married woman, *without any restraint or anticipation*, vests, in equity, the entire *corpus* in her for all purposes, as fully as a similar gift to a man would vest it in him." (The italics are mine.)

This is precise and carefully chosen language, and I can only read it to mean that if there had been a restraint on anticipation contained in the deed, it would not have vested "the entire *corpus* in her for all purposes". I draw the same deduction from that portion of the judgment of Sir William Grant in *Barford v. Street* (1809), 16 Ves. 135, 33 E.R. 935, referred to by Mr. Justice Kerwin in *In re Mewburn Estate; Robinson v. The Royal Trust Company*, [1939] S.C.R. 75, [1939] 1 D.L.R. 257. Sir William Grant was dealing with a will under which the testatrix gave and devised all the residue of her estate in trust to pay the rents, issues, dividends, etc., as the same should be received, to Mary Barford for and during the term of her natural life, and to and for her own sole and separate use and benefit, and not to be subject or liable to the control, debts or engagements of any husband she might marry, and from and immediately after her decease upon the further trust to convey, etc., the whole of the residue of the real and personal estate and effects to and among such person or persons and in such proportions and at such time or times and in such manner as Mary Barford, in her lifetime, whether married or single, should from time to time by deed or deeds, writing or writings appoint. Sir William Grant, at p. 139, says:

"What do you contend to be the nature and extent of her interest? An estate for life with an unqualified power of appointing the inheritance comprehends every thing. What induced me at first to doubt was the indication of an intention in the Codicil, that the estate should remain in the trustee for the life of the Plaintiff, with powers to her, inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest. But I do not think, I can by inference from thence controul the clear and express words, by which the power is given to the devisee to dispose of this estate in her life-time by any deed or deeds, writing or writings, or by her last Will and Testament. How can the Court say, that it is only by Will that she can appoint? *By her interest she can convey her life estate*: By this unlimited power she can appoint the inheritance.

The whole equitable fee is thus subject to her present disposition. The consequence is, that the trustee must convey the legal fee according to the prayer of the Bill." (The italics are mine.)

My reasoning from the language here used is that the whole equitable fee was subject to present disposition, because of two things: (1) the power of Mary Barford to convey her life estate; (2) the unlimited power to appoint the inheritance. I cannot read this case in any light other than that the absolute interest would not have been vested in Mary Barford if full power to convey her life estate had not co-existed with the unlimited power to appoint the inheritance.

Under the will here in question, these two powers are not co-existent. I have therefore come to the conclusion that question 1(a) should be answered in this manner:

"The share of the testator's estate in which each of his daughters took an interest under para. (g) did not vest in each daughter an absolute interest during coverture."

In coming to this conclusion I have not overlooked the decision in *Re Hooper* (1914), 7 O.W.N. 104. The report of that case does not disclose that the ground on which this case was argued was fully developed. It would appear that the two points that were considered were whether the passage referred to therein from Farwell on Powers applied, and whether the fact that the property was given to a married woman for her own separate use altered the application of the rule in *Shelley's Case*. It was held that it did not. *In re Onslow; Plowden v. Gaybord* (1888), 39 Ch. D. 622, was relied on. In that case no question of restraint on anticipation or alienation arose. While I have considered the decision in *Re Hooper* with great respect, the report does not disclose the language used in the will, and one must always be mindful in these cases of the words of caution expressed by Lord Wensleydale in *Roddy et al. v. Fitzgerald*, *supra*, at p. 878:

"But the language used in one will is very seldom a safe guide in another; the meaning of each expression is so varied by the context, and, perhaps, the true principles of construction are sometimes not properly carried into effect. The sound, reasonable, and well established general principles of interpretation, as the late Chief Justice of the Irish Court of Queen's Bench has observed, ought more to influence the Judges than the consideration of single cases."

I cannot find, on English authority, principles of interpretation that compel me to extend the rule in *Shelley's Case* to defeat the intention of the testator so obviously expressed in this will.

Costs of all parties will be out of the estate.

Order accordingly.

Solicitors for the executors, applicants: Blake, Anglin, Osler & Cassels, Toronto.

Solicitor for the executor of the will of Margaret Woods Browne: G. E. Burson.

Solicitor for George Sackville Browne: H. C. Walker, Toronto.

[HOPE J.]

Re Alliance Insurance Company and The Canada Trust Company.

Insurance—Mortgage—Covenant in Deed of Trust and Mortgage to Insure for Benefit of Trustee—Effect as Equitable Assignment of Insurance—Priority over Liens arising after Execution.

Taxation—Dominion Income Tax—Lien for Taxes—Moneys “otherwise payable to taxpayer”—The Income War Tax Act, R.S.C. 1927, c. 97, s. 72.

Conflict of Laws—Choice of Law—Insurance Policy Issued in British Columbia Statutory Form—Rights with respect to Proceeds of Policy after Adjustment of Loss—All Negotiations Conducted in Ontario—Rights as between Strangers to Insurance Contract.

A company, incorporated under the laws of British Columbia, but having an executive office in Toronto, executed, in Toronto, a deed of trust and mortgage to secure a debenture issue. In the deed the company covenanted to insure its buildings, etc. (which were situate in British Columbia) and assign the policies to the trustee for the benefit of the debenture-holders, and a further clause in the deed provided that moneys received by the trustee from insurance should be held by it as security for the debentures, subject to the right of the company to be reimbursed, out of such moneys, for expenditures in repairing or rebuilding. A policy was obtained, through the Toronto agents of the insurer, but countersigned by the British Columbia agents, and in the statutory form approved in the latter Province. This policy was never formally assigned to the trustee, but, a loss having occurred, the company gave the insurer a written direction to pay the proceeds to the trustee. Before this direction was given, or the loss had been adjusted, a claim was asserted by the Receiver-General, under s. 72 of The Income War Tax Act, for arrears of income tax owed by the company. A further claim was made, after adjustment of the loss and payment into court by the insurer, by the Workmen's Compensation Board of British Columbia, for assessments unpaid by the company. Held, the trustee was entitled to the full proceeds of the insurance, for the following reasons:

- (1) The covenant in the deed of trust and mortgage operated as an equitable assignment of the policy and the proceeds thereof, even in the absence of a mortgage clause or a formal assignment. *Greet v. Citizens' Insurance Company* (1879), 27 Gr. 121; 5 O.A.R. 596, applied. The mortgagee's claim attached the moment the insurance was effected, and the direction for payment was completed before the filing of the proof of loss or the adjustment.

- (2) Before the loss was adjusted and agreed to be paid, no attaching order could have been made. *Simpson v. Chase* (1891), 14 P.R. 280, applied. The demand for income tax was made before adjustment, at a time when the debt could not have been attached, and, in any case, after the company's claim had been assigned, and therefore could not, at common law, displace the rights of the trustee. *Beaty v. Hackett et al.* (1892), 14 P.R. 395; *Sinnott v. Bowden*, [1912] 2 Ch. 414, applied.
- (3) Section 72 of The Income War Tax Act did not apply to give the Receiver-General a priority, because the moneys were not "otherwise payable to the taxpayer", since they had been equitably assigned. *Re General Fireproofing Company of Canada Ltd.*, [1936] O.R. 225, 510; [1937] S.C.R. 150, applied.
- (4) The claim of the Workmen's Compensation Board of British Columbia could succeed only if the laws of that Province were applicable to it. Although the policy itself clearly was to be construed according to the laws of British Columbia, the rights here in question were not those of parties to the contract, or rights arising under it, but rights as between the mortgagee or assignee of the insured and another stranger to the contract, and the law applicable was therefore that of Ontario, where the insurance was negotiated and all the subsequent transactions connected with these rights took place. *Bitter v. The Secretary of State of Canada*, [1944] Ex. C.R. 61; *Workmen's Compensation Board v. Canadian Pacific Railway Company*, [1920] A.C. 184, applied.
- (5) Even if the laws of British Columbia were held to be applicable, s. 47 of The Workmen's Compensation Act of that Province, as amended, did not, on a proper construction, create a lien on these moneys. *In re Campbell River Mills Limited*; *Dinning v. Ingham* (1932), 44 B.C.R. 412, agreed with.

A MOTION by The Canada Trust Company for an order declaring it entitled to certain moneys in court. The facts are fully stated in the reasons for judgment.

12th and 13th December 1945. The motion was heard by HOPE J. in Weekly Court at Toronto.

Wilson E. McLean, K.C., for The Canada Trust Company, applicant.

D. J. Coffey, K.C., for the Receiver-General of Canada, *contra*.

J. L. McLennan, for the Workmen's Compensation Board of British Columbia, *contra*.

15th March 1946. HOPE J.:—This motion was originally heard by the late Chief Justice of the High Court, and was adjourned by him to permit notice of the motion to be served upon the Workmen's Compensation Board of British Columbia. Following the death of the late Chief Justice, the matter was, by agreement of counsel, brought before me on 12th and 13th December 1945 for re-argument.

The Reco Mountain Base Metal Mines Limited is a body corporate under the laws of the Province of British Columbia, owning a mining property with certain equipment in connection with

the operation therewith, all situated in the said Province. The company, however, maintained an executive office at the city of Toronto, from which all the executive management of the company was conducted.

In the ordinary course of its financing, the company raised money by a debenture issue secured by a deed of trust and mortgage to The Canada Trust Company dated 1st December 1942. The head office of The Canada Trust Company is at the city of London, Ontario, although it has a branch office in the Province of British Columbia.

The negotiations leading up to the preparation and execution of the deed of trust and mortgage, and the execution thereof, were completed solely in the Province of Ontario. In the deed of trust and mortgage, contained in s. 8 of art. V thereof, was a covenant by the Reco company:

"That it will insure and keep adequately insured the buildings, plants and all other properties which are of an insurable nature comprised in the mortgaged premises against loss or damage by fire, and will also carry such other insurance upon the mortgaged premises, as is usually carried by companies operating like properties under similar circumstances, in such insurance companies including New England mutuals or other companies, societies or exchanges for mutual insurance as its Directors may select and the Trustee may approve . . . and assign the said policies and make the insurance money payable to the said Trustee as its interest may appear for the benefit of the holders of the Debentures, the whole in such manner that insurance moneys available may be collected by the Trustee and be applied as hereinafter specified, and execute all transfers necessary for that purpose. . . .

"All moneys received by the Trustee from insurance upon the mortgaged premises shall be held by and applied by the Trustee pursuant to the provisions of Article VIII hereof."

While the terms of the trust deed as above extracted refer to art. VIII thereof, I take it that this is an error, and that it was intended to be art. VII, which provides for the application of money received by the trustee, and in s. 2 thereof provides as follows:

"All moneys received by the Trustee from insurance upon the mortgaged premises shall be held by it as security for the Deben-

tures secured hereby, subject to the right of the Company upon the written requisition of its Treasurer or Assistant Treasurer, authorized by resolution of the Directors, to receive from the Trustee and to apply any such moneys and the income thereof in reimbursement of expenditures made or in discharge of indebtedness incurred by the Company in repairing, re-building", etc.

By a policy, no. 27240, the Alliance Insurance Company of Philadelphia insured "Reco" with respect to the property covered by the deed of trust and mortgage. The policy is dated the 1st October 1943, and was issued on the approved British Columbia statutory policy form.

All negotiations leading up to the issue of the policy occurred as between the executive office of "Reco" in the city of Toronto and Macintosh & Company, the Toronto agents of the Alliance Insurance Company. No doubt because of internal agency arrangements, and also by reason of the fact that the property insured was located in the Province of British Columbia, there was some inter-agency arrangement that a percentage of the agency commission on the insurance should be allowed to the British Columbia agent of the Alliance company, *viz.*, Pemberton Insurance Corporation Limited. The policy also provided that it was not valid until countersigned by the British Columbia agent, by whom it was so countersigned.

Another endorsement attached to and forming part of the policy, however, increasing the amount thereof, is signed by Macintosh & Company, the Toronto agent of the Alliance company, with whom the negotiations leading to all of the insurance were completed. It is also admitted that the insurance policy was delivered by the Toronto agent to the Toronto office of "Reco".

A loss occurred on the 16th April 1944. Prior to this loss no assignment of the policy or order for the payment thereof had been given by "Reco", save as contained in the deed of trust and mortgage. On the 23rd May 1944, "Reco" did, in writing, direct the insurance company to pay the insurance moneys under the said policy to The Canada Trust Company. The loss was adjusted at approximately \$75,000 or \$76,000, in July of 1944, and after some attempt to effect payment of the loss, the insurance company applied to the Court for leave to pay the moneys due under the policy into court and obtain a discharge therefor. An order

of this Court was granted in due course, and the full proceeds of the policy were paid into court, subject to the claims which, in the meantime, had been asserted on behalf of the Receiver-General of Canada. All negotiations and proceedings in connection with the assignment of the policy, the proof of loss, and the payment of the claim as between the Alliance company, "Reco", and the trustee under the deed of trust and mortgage, were in the Province of Ontario.

On 26th April 1944, a demand pursuant to s. 72 of The Income War Tax Act, R.S.C. 1927, c. 97, was sent by the Income Tax Division of the Department of National Revenue at Ottawa to the Alliance Insurance Company at Toronto, demanding payment of income tax in the sum of \$11,129.80, claimed to be owing by the Reco company to the Receiver-General of Canada. This demand was duly received by the Alliance Insurance Company. A judgment was taken out in the Exchequer Court of Canada on the 21st August 1944, and notice of the said judgment was given to "Reco" on the 11th September 1944. Subsequently, on the 18th January 1945, a further claim and demand was made on behalf of the Receiver-General in the additional sum of \$2,305.55.

Upon the original hearing before the late Chief Justice of the High Court, inquiry was made by the Court as to any other possible claims against the insurance moneys. Mention was made to the Court of a possible claim of the Workmen's Compensation Board of British Columbia for the sum of \$8,582.71, due under an assessment dated the 2nd March 1945, for the years 1943 and 1944. The late Chief Justice directed that notice should be given to the Workmen's Compensation Board of British Columbia, with the result that Mr. McLennan appeared as counsel on behalf of the Board, asserting a claim which I shall discuss later.

The questions here to be determined are the rights and priorities, if any, of the three claimants. The facts are not in dispute.

That the covenant in the deed of trust and mortgage operates as an equitable assignment of the policy of insurance is, I think, quite clear. The mortgagee, whether there is a mortgage clause or not, is, by virtue of the covenant to insure in the mortgage, virtually the equitable assignee of the moneys payable under the policy of insurance.

In *Greet v. Citizens' Insurance Company* (1879), 27 Gr. 121 (reversed in part, but approved in this respect 5 O.A.R. 596), Spragge C. at p. 125, said:

"Then as to the title of the mortgagees to receive this insurance money. The case of *Watt v. The Gore District Mutual Insurance Company* [(1861), 8 Gr. 523], was decided before the passing of the short forms of Mortgages' Act, and in that case the late Vice-Chancellor *Esten* said 'I think, and it is conceded that the covenant to insure created a lien on the insurance moneys in favour of the plaintiff (a mortgagee) to the extent of his debt.' "

And again at p. 126: "*In re Sands Ale Brewing Company* (3 Bissell, 175) there was a covenant in a mortgage to insure, and to cause the insurance money in the event of loss to be made payable to the mortgagee. The insurance was effected, but not assigned, nor made payable to the mortgagee. The Court asks 'Can this make any difference?' and quotes with approval from Mr. *Parson's* book on Contracts, a passage which I think states correctly the right of a mortgagee in such a case as this: 'that when a mortgagor is bound by the mortgage contract to keep the premises insured for the benefit of the mortgagee (which is clearly the effect of our Act), and does in fact keep them insured by a policy which contains no statement that the mortgagee has any interest therein, the mortgagee nevertheless has an equitable interest in, and a lien upon the proceeds of the policy, which a Court of Equity will enforce for his benefit.' And the Court said, I think correctly: 'Equity made the assignment the moment the insurance was effected, if the mortgagor did not do it.' "

The *Greet* case was cited with approval in *In re Burce*, 17 Sask. L.R. 463, [1923] 2 W.W.R. 872, 4 C.B.R. 513; *vide* also *Goldie v. Bank of Hamilton* (1900), 27 O.A.R. 619.

In an unreported decision in 1927 (not subsequently appealed) in *Hay v. Royal Exchange*, the then Master (later Mr. Justice Garrow), for whose opinion I have the greatest respect, held that the mortgagee's claim by virtue of such equitable assignment takes precedence over garnishee or attaching orders obtained after a loss by fire has been adjusted and agreed to be paid.

In *Simpson v. Chase* (1891), 14 P.R. 280, it was held that no attaching order can be made until loss is admitted and is payable or is accruing due, as otherwise there is no debt to attach.

The mortgagee's claim herein attached by way of equitable assignment the moment the insurance was effected. An assignment in writing or direction for payment of the proceeds of the loss to the mortgagor was completed on 23rd May 1944, and before the filing of the proof of loss or the adjustment of the loss in July 1944. The demand pursuant to s. 72 of The Income War Tax Act, R.S.C. 1927, c. 97, was made upon the insurance company on the 26th April 1944, at a time when, according to *Simpson v. Chase, supra*, the debt could not be attached.

In *Beaty v. Hackett et al.* (1892), 14 P.R. 395, it was held that:

"A garnishee order binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order *nisi* is obtained and served.

"Where a final order for payment over has been issued and it afterwards appears that the debt was assigned before the attaching order was moved for, the final order should be rescinded."

Similarly in *Sinnott v. Bowden*, [1912] 2 Ch. 414 at 421:

"The only remaining question is whether the rights of the mortgagees have been displaced by the garnishee order *nisi*. In my opinion they have not. It appears from the cases of *Evans v. Rival Granite Quarries, Ltd.*, [1910] 2 K.B. 979, *Cairney v. Back*, [1906] 2 K.B. 746, and *Norton v. Yates*, [1906] 1 K.B. 112, that the equitable rights of the holder of a floating charge will not be displaced by a garnishee order, even when made absolute, if before actual payment the charge crystallizes and the holder applies for relief. It appears to me that the principle of those cases must, a fortiori, apply to a right conferred by statute."

The foregoing decisions are applicable to the facts herein as between the mortgagee and the Receiver-General of Canada, unless the provision of s. 72 of The Income War Tax Act gives to the latter a priority. Mr. Coffey so contended, arguing that the rights of the Crown prevailed even at a point of time "when the Minister . . . suspects that any person . . . is about to become indebted to a taxpayer". Thus Mr. Coffey claimed that there need not be an admission of loss, creating a debt due for attachment. This might be successfully argued, in my opinion, with

respect to moneys "otherwise payable to the taxpayer", in the words of the section, but cannot be enlarged to extend to and include moneys which have been assigned in law or equity to another.

I am unable to find that the moneys arising from the insurance policy can be said to be otherwise payable to the taxpayer. Such moneys are clearly payable to the mortgagee. The proviso in the deed of trust making them available for rebuilding of the property cannot free them of the claim of the mortgagee whose protection demands the replacement of the mortgaged premises or the liquidation of the mortgage debt.

In *Re General Fireproofing Company of Canada, Ltd.*, [1936] O.R. 225, [1936] 2 D.L.R. 348, 17 C.B.R. 246, varied [1936] O.R. 510, [1936] 4 D.L.R. 88, 17 C.B.R. 371; [1937] S.C.R. 150, [1937] 2 D.L.R. 30, 18 C.B.R. 159, it was held that under a somewhat similar statutory provision the claim of the Crown is not entitled to priority over claims for which liens or charges exist. Nor can the Crown in the right of the Dominion rely on a preference or priority by reason of s. 92(7) of the Act, as amended, which gives a priority only to such amounts as may be deducted or withheld under subss. (1) and (2) of the same section: *vide Workmen's Compensation Board v. Graham and Barrow*, 61 B.C.R. 36, [1945] 1 D.L.R. 557, [1944] C.T.C. 225.

The claim of the Minister to this fund or any share thereof must fail.

The claim of the Workmen's Compensation Board of the Province of British Columbia is based on two main submissions, first to the payment out of the insurance funds of the sum of \$8,582.71 due to the Board for assessments made against "Reco" under The Workmen's Compensation Act; R.S.B.C. 1936, c. 312, and secondly, that the said sum is payable to the Workmen's Compensation Board of British Columbia in priority to other claims by virtue of s. 47 of the British Columbia Workmen's Compensation Act, as amended.

To succeed, Mr. McLennan concedes that the Court must be satisfied on two points:

1. that the Court should consider and apply the laws of the Province of British Columbia to the determination of the rights of the Workmen's Compensation Board of that Province; and

2. that, so applying the laws of British Columbia, then the Board is entitled to a lien upon this particular fund by virtue of s. 47 of the British Columbia Workmen's Compensation Act.

On the facts of this case I do not think that there is any doubt that in the event of any litigation based upon the contract of insurance, as between the parties to the said contract, then, by the terms of the said contract, the law applicable would be that of the Province of British Columbia. But I can find nothing either within the contract or otherwise which would extend this application of the law of British Columbia to the determination of the rights of parties outside the contract.

In *Bitter v. The Secretary of State of Canada*, [1944] Ex. C.R. 61, [1944] 3 D.L.R. 482, it was held:

"The situs of a simple contract debt is in the country where the debtor resides; but where the debtor is a corporation which has more than one residence, i.e., carries on business in several jurisdictions, the situs of such a debt is where its payment has been localized either by the course of business between the parties or by the express terms of the contract."

In the present instance the rights to be considered are not as between the insurer and the insured, but as between the mortgagee or assignee of the insured and another stranger to the contract. The law applicable thereto is not, in my opinion, that stipulated by the insurance policy, but that which is dictated by the course of business between the mortgagee, the insured and the insurer. Such course of business was solely within the Province of Ontario, the insurance was negotiated in Ontario, as was the premium paid, the policy delivered, the direction for payment of the loss to the mortgagee and the filing of proof of loss. The terms of The Workmen's Compensation Act of British Columbia have no extra-territorial effect upon civil rights. In this connection I have given consideration to the Privy Council decision in *Workmen's Compensation Board v. Canadian Pacific Railway Company*, [1920] A.C. 184, 48 D.L.R. 218, [1919] 3 W.W.R. 167. In that case, as stated at p. 191, their Lordships were not considering a case in which it was sought to enact any law giving a right to arise from a source outside of the Province. And again:

"The scheme of the Act is not one for interfering with rights outside the Province. It is in substance a scheme for securing a civil right within the Province."

In the same case, but referring to *Royal Bank of Canada et al. v. The King*, [1913] A.C. 283, 9 D.L.R. 337, C.R. [1913] A.C. 77, 3 W.W.R. 994, 23 W.L.R. 315, Viscount Haldane proceeds to state, at p. 192: "The rights affected were in that case rights wholly outside the Province."

But even if it were to be held that the law of British Columbia were applicable herein, then it is conceded by Mr. McLennan that the only right of his client arises by virtue of the provision of s. 47 of The Workmen's Compensation Act of British Columbia, as amended by 1943, c. 72, s. 33, which reads as follows:

"47. Notwithstanding anything contained in any other Act, the amount due to the Board by an employer upon any assessment made under this Act, or in respect of any amount which the employer is required to pay to the Board under any of its provisions, or upon any judgment therefor, shall have a lien payable in priority over all liens, charges, or mortgages of every person, whenever created or to be created, with respect to the property, real, personal, or mixed, used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable, excepting liens for wages due to workmen by their employer, and such lien for the amount due the Board shall be valid and in force with respect to each assessment for a period of three years from the end of the calendar year for which the assessment was levied."

Mr. McLennan agreed that a contract of insurance is a personal contract. Moreover, it is well accepted that it is a contract of indemnity, *i.e.*, to provide for the payment of a sum of money to meet a loss or detriment which will or may be suffered by the insured upon the happening of the stipulated event, *e.g.*, loss by fire.

Assuming that s. 47 does create a lien in favour of the Board, then in my opinion the same cannot be said to attach to the proceeds of the insurance policy. Such proceeds cannot be held to be "used in or in connection with or produced in or by the industry", but rather came from another source of income. In this regard, I find myself in complete agreement with Macdonald J.A. in the opinion expressed in *In re Campbell River Mills Limited; Dinning v. Ingham*, 44 B.C.R. 412, also reported *sub nom. Dinning v. Workmen's Compensation Board*, [1932] 1 W.W.R. 136, [1932] 1 D.L.R. 373, 13 C.B.R. 256, a decision

of the British Columbia Court of Appeal reversing the trial judgment and dealing with the application of s. 47, formerly s. 46, to the proceeds of a fire insurance policy. Mr. Justice Macdonald says, at p. 420 (B.C.R.), 379 (D.L.R.);

"The fund in question is an indemnity paid by an insurance company in respect to a fire loss. Is this fund 'the property real, personal or mixed' of the bankrupt company 'used in, or in connection with or produced by the industry'? I think not: It arose from another source . . . In *B.C. Fir & Cedar Lumber Co. v. The King*, [1931] S.C.R. 435, [1931] 3 D.L.R. 354, where it was sought to tax as income monies received in lieu of profits under a policy providing for indemnity for loss of earnings through fire, the Supreme Court of Canada held that the proceeds of the insurance policy could not be regarded as profits earned by the business for the purposes of taxation . . . This insurance fund did not arise from nor is it incidental to the operation of the business. The bankrupt's property or the industry carried on did not produce it. It was produced by a contract providing that if a certain contingency arose a sum of money would be paid. A lien or charge is created with respect to the property to which it attaches and extends no further unless moneys received from a defined source is mentioned. Priority under section 46 is only given in respect to charges on the property or industry, not on other sources of income, *e.g.*, an insurance contract. It is property 'used in' or 'produced by' the industry (*e.g.*, manufactured products). It would be possible to enlarge the section to include such a fund but even a liberal construction of the words used would not permit such an extension."

There shall therefore be judgment declaring that neither the Minister of National Revenue nor the Workmen's Compensation Board of British Columbia takes any part of the fund in court, but that the trustee under the deed of trust is entitled to the whole thereof, subject to the payment of the taxed costs of all parties hereto out of the said fund.

Judgment accordingly.

Solicitors for The Canada Trust Company: Fennell, Porter, McLean and Davis, Toronto.

Solicitor for the Receiver-General of Canada: D. J. Coffey, Toronto.

Solicitors for the Workmen's Compensation Board of British Columbia: McDonald & McIntosh, Toronto.

[SCHROEDER J.]

Williams and Wilson Limited v. The City of Toronto and the Attorney-General for Ontario.

Highways—Constitution—Dedication and Acceptance—Burden of Proof—Action by Owner of Paper Title for Declaration that No Rights of Passage Exist—Attorney-General as Party Defendant to Action—The Municipal Act, R.S.O. 1937, c. 266, s. 454.

Crown—Action against Attorney-General—Declaration Sought as to Rights of Public.

Evidence—Real Property—Registered Memorials of Old Instruments—Conditions of Admissibility—The Vendors and Purchasers Act, R.S.O. 1937, c. 168, ss. 1(c), 2—The Evidence Act, R.S.O. 1937, c. 119, s. 54.

Where the owner of the paper title to a piece of land sues for a declaration that the title is free of any claim of the municipality to it as a highway, and the municipality alleges that the land has become a highway by dedication and acceptance, the burden of proof, once the paper title has been established, is upon the municipality, and this onus is not satisfied by merely raising a doubt as to the legal position of the land.

It is not permissible, in support of such a contention, to produce a memorial, not executed by the grantor, of a bargain and sale of a block of land including that now in dispute. Sections 1(c) and 2 of The Vendors and Purchasers Act, and s. 54 of The Evidence Act, apply to render such a memorial admissible only where possession of the land in accordance with its terms has been established. Nor can it be admitted as secondary evidence of the original deed, even if the non-production of the original is satisfactorily accounted for, since it is impossible to say that it is a true copy. Since the memorial is inadmissible in evidence, it follows that old plans, etc., admittedly based upon the memorial, are also inadmissible.

Where there is no direct evidence as to an owner's intention, an *animus dedicandi* may be inferred either from the fact that a highway has been maintained and repaired by the proper authority or from the fact of uninterrupted public user. If, however, there is no evidence of either of these facts, no such intention can be presumed.

The Attorney-General is a necessary and proper party to such an action, as representing the rights of the public. Although the soil and freehold of highways is vested in municipalities by s. 454 of The Municipal Act, they are not in a strict sense trustees for the public, and a judgment against a municipality alone would not bind the public at large.

Review of authorities.

AN ACTION for a declaration, particulars of which are fully set out in the reasons for judgment.

11th, 18th, 19th, 20th, 21st and 22nd February 1946. The action was tried by SCHROEDER J. without a jury at Toronto.

J. R. Cartwright, K.C., and H. A. Harrison, for the plaintiff.

F. A. A. Campbell, K.C., for the City of Toronto, defendant.

C. R. Magone, K.C., for the Attorney-General for Ontario, defendant.

27th March 1946. SCHROEDER J.: This is an action brought by the plaintiff for a declaration that so much of the triangular block of land in the city of Toronto bounded by Wellington, Front and Old Toronto Streets as is contained within the description of a certain deed to the British America Assurance Company, registered in the Registry Office for the Registry Division of the City of Toronto on the 28th day of June 1875, as number 10996-A, and lies east of a line parallel to, and 4 chains and 54 links east of, the easterly boundary of Yonge Street, is free of any claim of the defendant corporation and of any right of the public to use the same as a highway. The plaintiff alleges that it is the owner of the lands described in the deed above mentioned, which includes all the frontage on the west side of Scott Street, in the city of Toronto, between Wellington and Front Streets, with the exception of a property lying to the north thereof and extending for a distance of 80 feet more or less from the south limit of Wellington Street. It seems to be common ground that Scott Street was opened to the public through the said triangular block to the full width of 66 feet by the Honourable Thomas Scott in or about the year 1820, and that the same was accepted by public user, and since that time has been and still is a public highway. The defendant corporation alleges that the west limit of Scott Street, between Wellington and Front Streets, is a line parallel to Yonge Street, 4 chains, 54 links east of Yonge Street. The plaintiff denies that the west side of Scott Street is at this point, and contends that the west limit of Scott Street is actually 6 feet east of the line which the defendant corporation sets up as the westerly limit of Scott Street.

The Attorney-General has made no claim to the 6-foot strip of land in question, but was joined as a defendant as representing the public and to enable the Court to pronounce a judgment in the action binding upon the public in respect of any right that might be claimed for public user of the lands in question or any part thereof as a public highway. The Attorney-General submits that if there was a dedication of the land in question for a public highway the freehold is vested in the corporation of the municipality, and that he has no interest in the action and has been improperly joined, submitting all such rights and interests

in the subject matter as His Majesty shall appear to have therein to the judgment of the Court.

At the trial the plaintiff filed five title deeds, being exhibits 3, 4, 5, 6 and 8, and claimed that such documents clearly established its title to the 6-foot strip in dispute. I shall deal later with the evidence offered by the plaintiff to establish possession of this land by it and by its predecessors, but the plaintiff contends, and I think rightly so, that its possession would in any event be co-extensive with the boundaries set forth in its deeds of title. On this point reference is made to *Harris v. Mudie* (1882), 7 O.A.R. 414, and *Maccomb et al. v. Town of Welland* (1907), 13 O.L.R. 335 at 339.

The plaintiff also filed a plan, ex. 1, which shows the westerly limit of Scott Street as claimed by the City, as well as the westerly limit of Scott Street referred to in the deed, ex. 8, registered as instrument No. 10982-A, as claimed by the plaintiff.

In my opinion, the soil and freehold having been shown to be vested in the plaintiff, the onus devolves upon the defendant municipal corporation to establish that the plaintiff's ownership had become subject to a right in the public, the question being whether, as against the plaintiff, there was sufficient evidence of an intention on the part of the owners of the soil to dedicate the land in question herein to the public as a highway: see *Maccomb et al. v. Town of Welland*, *supra*, per Moss, C.J.O. at p. 339. In the case just cited the Court held that it was incumbent upon the defendant corporation, which was claiming a right of highway over the plaintiff's lands, to "shew clearly *and beyond any reasonable doubt* that the plaintiffs' ownership had become subject to a right in the public." (The italics are mine.) Reference is made in that case to the case of *Chinook v. Hartley Wintney Rural District Council* (1899), 63 J.P. 327. See also *Pearson v. Coles* (1832), 1 Mood. & R. 206, 174 E.R. 70; *Ferrand v. Milligan* (1845), 7 Q.B. 730, 115 E.R. 664; *Thornhill v. Weeks*, [1913] 2 Ch. 464; *Jalbert v. The King*, [1936] Ex. C. R. 127, reversed [1937] S.C.R. 51, [1937] 2 D.L.R. 291.

Notwithstanding the fact that the plaintiff makes a claim *qua* plaintiff in the proceedings, it seems to be abundantly clear that the burden of proof that the plaintiff's land is subject to a right of highway rests upon the defendant municipal corporation, which asserts affirmatively that it is subject to such right.

The defendant corporation rests its defence to this action principally upon a certain memorial of bargain and sale which was filed, subject to objection, as ex. 22. This document bears date the 5th day of August 1820, and purports to be a memorial of an indenture of bargain and sale bearing date the 8th day of June 1820, between the Honourable Thomas Scott of the one part, and the Honourable George Crookshank and William Allan of the second part, whereby the party of the first part purported to have conveyed to the parties of the second part a strip of land 66 feet in width and extending approximately from what is now Wellington Street to Front Street. The point of commencement in the description of the property contained in this instrument is the south side of Market Street at a distance of 4 chains and 54 links "measuring from where the Eastern Limit of the Street leading to Yonge Street intersects the southern limit of Market Street near the north west angle of broken Lot number One between Front Street and Market Street", etc. The land purports to have been conveyed to the parties of the second part in trust, to be held by them in trust "forever for a public highway or road and to and for no other use intent or purpose whatsoever". The memorial was signed by the parties of the second part, as the bargainees, but it was not signed by the Honourable Thomas Scott, the bargainor. Counsel for the plaintiff objected to the admissibility of the memorial of bargain and sale referred to, basing his objection on the provisions of The Vendors and Purchasers Act, R.S.O. 1937, c. 168, s. 1 (c), reading as follows:

"1. In the completion of a contract of sale of land the rights and obligations of the vendor and the purchaser shall, subject to any stipulation in such contract to the contrary, be regulated by the following rules:

"(c) A registered memorial twenty years old of any other instrument, if the memorial purports to be executed by the grantor, or in other cases if possession has been consistent with the registered title, shall be sufficient evidence without the production of the instrument to which the memorial relates, unless and except in so far as such memorial is proved to be inaccurate, and the vendor shall not be bound to produce the original instrument unless it is in his possession or power, and the memorial

shall be presumed to contain all the material contents of the instrument to which it relates.”

Section 2 of the same statute provides that:

“2. In an action it shall not be necessary to produce any evidence which, by section 1 is dispensed with as between vendor and purchaser, and the evidence therein declared to be sufficient as between vendor and purchaser shall *prima facie* be sufficient for the purposes of such action.”

On this point reference was also made by the defendant to The Evidence Act, R.S.O. 1937, c. 119, s. 54, where it is provided:

“54. It shall not be necessary in any action to produce any evidence which, by section 1 of *The Vendors and Purchasers Act*, is dispensed with as between vendor and purchaser, and the evidence declared to be sufficient as between vendor and purchaser shall be *prima facie* sufficient for the purposes of the action.”

Counsel for the defendant corporation submits that he has proved possession by the said defendant consistent with the registered title based on the memorial above mentioned, and that the memorial is therefore admissible in evidence against the plaintiff. There is, of course, no doubt that Scott Street, over part of the area described in the memorial of bargain and sale of 1820, was laid out as a public highway and paved, and that sidewalks were constructed, but admittedly nothing of this nature was done over the 6-foot strip in question. There would appear to be some doubt in the mind of Leslie B. Allan, the city roadway engineer, as to where the east limit of Scott Street is now located, although he says that the City has done work on the east side of Scott Street up to the westerly walls of the buildings on that street between Front Street and Wellington Street. In *Van Velsor et al. v. Hughson* (1882) 9 O.A.R. 390, Patterson J.A., writing the judgment of the Court, states at p. 401: “The primary object of the statute being to simplify the proof of titles between vendor and purchaser, it is obvious that the possession spoken of is possession of the very land to which title is being made; and the extension of the same rule to proof of title in an action gives it no larger effect, but leaves it to be read as applying to the possession of the very land the title to which has to be proved in the action.

"I think, therefore, that the acts shewn to have been done upon paper, even if accompanied or followed by possession of some of the other lands, cannot be treated as sufficient to justify the admission of the memorial as evidence of the deed as against this defendant, if we regard him as a stranger to the title under which the plaintiffs claim."

I do not believe that any doubt has ever been cast upon the correctness of this authority, and in all the circumstances I must hold that the memorial of the indenture of bargain and sale between the Honourable Thomas Scott of the one part, and the Honourable George Crookshank and William Allan of the other part, is not admissible in evidence against the plaintiff.

The defendant corporation then submitted, as proof of its contention, certain old plans prepared by land surveyors in the 1870's, on the ground that they were written declarations made by deceased persons in the ordinary course of duty contemporaneously with the facts stated and without motive to misrepresent, and that they were therefore admissible in proof of their contents. They were also put forward on the ground that they constituted declarations made by deceased persons of competent knowledge *ante litem motam*, and were therefore admissible in proof of ancient rights of a public or general nature. From an examination of these plans or sketches and the field notes, which were filed subject to objection, it would appear that the authority or basis adopted by the declarants for showing the westerly boundary of Scott Street as there shown was the disputed memorial of 1820. I cannot see how these documents, even if admissible, can afford any assistance to the Court in determining the question before it, because the author is doing no more than interpreting and applying a document which I have held to be inadmissible as against the plaintiff in this action. Furthermore, it was held by James L.J. in *Polini v. Gray* (1879), 12 Ch. D. 411, affirmed *sub nom. Sturla v. Freccia* (1880), 5 App. Cas. 623, that the entry must relate, not to something said, learned or ascertained by the declarant, but to something done by or to him. Can it be said that the surveyors who prepared the plans or sketches in question are in any better position to interpret and apply the disputed memorial than the Court would be at the present time? Reference is made quite distinctly, both in the plans and in the field notes, to the

memorial of 1820, and there is no doubt whatever in my mind that in the preparation and drawing of these plans or sketches the memorial was adopted as the basis for establishing the west side of Scott Street as therein established.

It is interesting to note that in the plan, ex. 10, prepared by Messrs. Wadsworth, Unwin and Browne in the year 1874, there are red lines indicating what are said to be the true easterly and westerly boundaries of Scott Street and black lines indicating the "present boundaries". The black line on the west side of Scott Street runs along the easterly wall of a building which was on the northwest corner of Scott and Front Streets in the year 1874, and continues along an "existing fence". The true boundary indicated by the red line would be some 6 or 7 feet to the west of this line. Thus the defendant corporation's own exhibit, which was put forward as proof of its contention in this action, indicates that even in the year 1874 surveyors considered the actual westerly boundary of Scott Street to be approximately 6 feet to the east of what was even then referred to as the "true boundary", based, as stated, on an interpretation of the disputed memorial of bargain and sale.

The defendant corporation's witnesses had to concede that in placing the westerly boundary of Scott Street in the position contended for by the City they did so because it was so described in the memorial of 1820. It was not seriously suggested that the old surveyors, whose plans and field notes were put forward as exhibits, had not likewise based their opinions upon the description of the property set forth in the said memorial. It would seem that most of the surveys in the city of Toronto, in this area particularly, are based upon an old plan of the town of York on which no measurements are given, but traditionally the lots shown on this plan are generally accepted to have been 3 chains and 17 links in width and the highways 1 chain in width. In *City of Toronto v. Pilkington Brothers Limited and Weber* (1915), 7 O.W.N. 806, affirmed 8 O.W.N. 486, the Honourable Mr. Justice Middleton stated, in referring to certain plans produced from the Crown Lands Office, which, I take it, had reference to the old plan of the town of York to which I have already referred:

"The instructions to the surveyors have not been found. The plans themselves bear no indications of the size or dimensions

of the lots, and are in fact manifestly misleading, as, if any attempt is made to compare the width of the streets as laid down upon these plans with the size of the lots as they are laid out, it becomes at once apparent that no uniform scale has been used in the plotting of the plans. In truth, the plans are little more than sketches shewing the relative positions of the lots and streets."

And at p. 807 the learned justice continues: "The truth is that in the early days, when land was of nominal value only, surveys appear to have been made with great inexactitude."

It is alleged by the plaintiff's witnesses, whose evidence upon this point has not been challenged, that having regard to the old town of York plan, which is taken as the basis of surveys in the portion of Toronto with which we are concerned in this case, and measuring from the east side of Church Street to the west side of Scott Street, there is an actual surplusage of 10 feet, 6 inches, so that in fact the boundary on the west side of Scott Street might well be extended a further distance of 10 feet, 6 inches easterly. Charles J. Manser, called on behalf of the defendant corporation, states that in fixing the westerly boundary of Scott Street at a point 4 chains, 54 links east of the easterly boundary of Yonge Street, he did not see fit to make his measurements from Church Street, although in the patent granted in the year 1805 to the Honourable Thomas Scott, covering the whole triangular block of which the lands in question form a part, the measurements are made from Church Street easterly.

The defendant corporation further contended that if it were to be held that the memorial of 1820 was not admissible in evidence, secondary evidence of the contents of the original document, of which it purported to be a memorial, should be received in evidence. No doubt at this time it is difficult to obtain evidence to account satisfactorily for the non-production of the original document of title, but even if I were satisfied that a proper and complete search had been made, and that the non-production of the original had been satisfactorily accounted for or explained, I fail to see how I can accept the memorial of 1820 as being a true copy of the original. Great strictness of proof is required. On this point reference is made to *Brindley et al. v. Woodhouse* (1845), 1 Car. & K. 647, 174 E.R. 974. The judg-

ment of Pollock C.B. in the latter case was followed and approved in *Re The Halifax Commercial Banking Company Limited and Wood* (1898), 79 L.T. 183 at 185, affirmed 79 L.T. 536. On this branch of its defence the defendant corporation fails.

One must not overlook the fact that where there is no direct evidence as to the intention of the owner, the *animus dedicandi* may be presumed either from the fact that a highway has been maintained and repaired by the public body or from the fact of public user without interruption. As I have already indicated, however, there is no such user of the disputed 6-foot strip, on the part of the defendant corporation or of the general public, from which an intention to dedicate that particular portion of the plaintiff's property can be inferred. In point of fact, the evidence as to user of this property by the general public is entirely and directly to the contrary, as will appear from what is hereinafter stated.

In order that a public highway may be established by dedication two concurrent conditions must be satisfied: (1) there must be, on the part of the owner, the actual intention to dedicate; and (2) it must appear that the intention was carried out by the way being thrown open to the public and that the way has been accepted by the public: *Bailey et al. v. The City of Victoria et al.* 60 S.C.R. 38, 54 D.L.R. 50, [1920] 1 W.W.R. 917; see also 29 Corpus Juris, 1st ed. 1922, p. 371. The plaintiff contends, and the contention is not without merit, that there is not the slightest evidence that this 6-foot portion of the plaintiff's property was ever thrown open to the public, or that there has been any manifestation of acceptance of such portion by the public. It goes further, and adduces evidence to indicate that, notwithstanding the terms of the description of the alleged dedicated portion set out in the memorial of 1820, there is evidence of a physical laying out of the roadway on the part of the donor, the Honourable Thomas Scott, which makes it abundantly plain that the area which is the subject of the contest between the parties was never intended by him to be included as part of the highway, this submission being made subject to the plaintiff's objection to the admissibility of the memorial. The plaintiff cites the case of *Attorney-General v. Esher Linoleum Company, Limited*, [1901] 2 Ch. 647, as authority for the prop-

osition that there is a presumption of law, in the absence of evidence to the contrary, that the owner has dedicated to the public use as a footway all the space that he has devoted to traffic in fact, and contends that he cannot be said to have dedicated such portion of the property as was not so devoted to traffic.

On the common law principle that private documents thirty or forty years old, produced from proper custody and otherwise free from suspicion, prove themselves, so that no evidence of the handwriting or signature need be given, the plaintiff produced a declaration of William McMurray dated 11th December 1877, filed as ex. 23; a declaration signed by Patrick Graham dated 16th August 1877, filed as ex. 24, and a declaration signed by Clarke Gamble dated 17th August 1877, filed as ex. 25. These declarations were produced from the custody of the plaintiff's solicitor, where they might naturally and reasonably be expected to be found. Such custody is, in my opinion, sufficient to bring this rule into operation. Of course, these documents are not thereby rendered admissible if they are otherwise inadmissible in evidence. If receivable at all, they must be received as declarations made by deceased persons of competent knowledge *ante litem motam*, and must afford proof of ancient rights of a public or general nature. The cumulative effect of these declarations is that for many years, going back to the days when the Honourable Thomas Scott resided upon the lands in question, there was a fence marking the boundary of the property along what is now known as Front Street. The precise location of this fence does not appear except from the declaration of Patrick Graham, who speaks of the building of a Mr. Arnold, which was erected at the north-west corner of Front and Scott Streets. This would appear to be the building which is shown on the plan ex. 10 as the Grand Trunk ticket office. It would appear that the east wall of this building was built up to the fence line, and the fence was removed for that purpose as far as the northerly wall of the building, but it continued to run northerly towards Wellington Street. It was argued that these declarations, if they proved anything, only proved ancient rights of a private nature. That depends entirely, however, upon the side of the fence from which these declarations are viewed. It may be argued with equal force

that they affect public rights, such as a right of highway, because if it were in the interest of the public to prove that the westerly boundary of Scott Street was along the old fence line, how could it be said that these declarations did not lend themselves to the proof of an ancient right of a public or general nature? That this fence was in existence in the year 1874 is placed beyond doubt by ex. 10, the plan of Mr. MacDonald's purchase, prepared by Wadsworth, Unwin and Browne in the year 1874. This plan, which was filed by the defendant municipal corporation, appears to recognize the existing fence line as the then westerly boundary of Scott Street, while it indicates by a red line what was, in the opinion of the surveyor who prepared the plan, the true westerly boundary of Scott Street, the source of his information being undoubtedly the memorial of 1820, as all the evidence seems to indicate.

In view of what has been established in this case with regard to the fence line on the west side of Scott Street, having regard to the fact that neither the defendant corporation nor members of the public made use of the portion of the highway formerly enclosed by the fence, and having regard to the evidence of Mr. Leonard G. Singer, district manager of the plaintiff company, who states that his company is now operating a parking lot on the area in question and had been doing so since 1939 as a tenant of the former owner, it would seem to be clear that it was not the intention of the donor, or of any of his successors in title, to dedicate to public use the 6-foot strip of land with which we are concerned in this case, nor would there appear to have been any acceptance of it as such on the part of the public.

In *Hastings v. The City of St. Catharines* (1878), 43 U.C. Q.B. 134, this very question came before the Court for consideration. In that case, in order to widen a street in the city of St. Catharines, the plaintiff and other owners of the land on each side of the street had agreed to give the corporation a strip of land bordering thereon, not exceeding 5 feet in depth. Some forty years before, the street had been dedicated to the public by the then owner of the land, and a plan had been made by which the plaintiff Hastings appeared to be some 7 feet on the street, but as the street was actually laid out on the ground and used by the public the 7 feet was included within the owner's fence, and had continued so ever since. The corporation claimed

that this 7 feet was part of the street, and that it was therefore entitled to take from the plaintiff under the agreement 5 feet in rear of the 7 feet. It was held by a Divisional Court, in ejectment, that the 7-foot strip could not under the circumstances be deemed to be part of the street, not having been used or accepted by the public as such, and that the corporation under the agreement could only take the 5 feet bordering on the street as it then existed.

There is an American case in which a similar disposition of this question was made, namely, *Weiss v. City of Mount Vernon et al.* (1913), 157 App. Div. (N.Y.) 383, affirmed by the Court of Appeal of New York State (1915), 215 N.Y. 657, 109 N.E. 1095. The late Mr. Justice Cardozo was a member of the Court which decided the latter appeal.

As against these cases counsel for the defendant corporation cites *The Queen v. Donaldson et al.* (1874), 24 U.C.C.P. 148. This was a decision of Gwynne J., sitting as a Court of first instance. When carefully examined, this latter decision is not in conflict with the decision in *Hastings v. The City of St. Catharines*, *supra*, and is in my view clearly distinguishable.

The defendant corporation filed as ex. 15 a plan prepared by Mr. Louis F. Eadie, Deputy City Surveyor of the city of Toronto. This plan indicates that the property conveyed to the plaintiff clearly extends to the point contended by the plaintiff to be the westerly boundary of Scott Street. This can be clearly observed when one examines the parcels "hatched" in blue. On the same plan, however, Mr. Eadie indicates that by instrument no. 6581, which was a deed from the Honourable Thomas Scott to the Honourable L. P. Sherwood made in 1829, the easterly boundary of the lands conveyed to the Honourable Mr. Sherwood, a predecessor in title of the plaintiff, coincides with what the defendant corporation contends is the true westerly limit of Scott Street. Mr. Eadie frankly admitted that in order to determine the position of the parcel conveyed by the 1829 deed from Scott to Sherwood he had to assume that he had correctly located the easterly and westerly boundaries of Old Toronto Street, a highway shown on the old town of York plan which was never opened to public use. He admitted that no one could state accurately at the present time what were the true boundaries of Old Toronto Street, and that its true position must

always remain a matter of doubt. This witness's conclusion, therefore, can be no stronger than his premises, and in my opinion there is no merit in the City's contention that subsequent grantors clearly conveyed more property than they had a legal right to convey. It would seem that the location of Old Toronto Street had been marked by posts or in some similar manner, but there is no one living who can say where those posts or markers were located. Mr. Eadie frankly admits this fact, and when one pays due regard to what has been said about the existence of a surplusage of 10 feet, 6 inches between Church Street and Scott Street, accepting the old town of York plan as the basis, it is readily observed how difficult it is for anyone to say with any degree of exactitude what were the limits of Old Toronto Street.

Even assuming, without deciding, that the plans and other documents put forward in proof by the City under the ancient documents rule are admissible, the defendant corporation has failed, in my view, to discharge the onus resting upon it. Putting the City's case on the highest possible basis, it cannot be said that the defendant corporation has done anything more than to create a state of doubt as to the true westerly limit of Scott Street, and if that be so the City has failed to discharge the onus of proof to which it is subject. It is not without significance that if, as indicated on ex. 10, the black lines on the easterly side of Scott Street then constituted the easterly boundary of Scott Street as it appears to be today, then if the 6-foot strip in question were included as part of the highway, it would occupy substantially 72 feet instead of occupying only 66 feet.

I have no hesitation whatever in coming to the conclusion that the defendant corporation has failed to establish a right of highway over the most easterly 6 feet of the plaintiff's property, or any right of the public to use the same as a highway.

It is contended by the City that to grant the relief asked for by the plaintiff would be to disregard the maxim "once a highway, always a highway". There is no doubt about the correctness or the force of this well-known maxim, but the plaintiff is not seeking in this action to extinguish a highway, or to close a highway. The plaintiff is asking the Court to declare that a highway never existed over the area in question. The defendant corporation further contends that the rights of the public over

a highway cannot be released and cannot be barred except under the provisions of an appropriate statute. The answer of the plaintiff, however, is the same, namely that it is not asking for the extinction or the release of any public rights over its land, but for a declaration of the Court that such a right never came into existence and does not now exist.

The defendant corporation further contends that the declaratory judgment for which the plaintiff is asking pursuant to s. 15 (b) of The Judicature Act, R.S.O. 1937, c. 100, is a discretionary remedy, and that in the circumstances existing in this case my discretion should not be exercised in favour of the plaintiff. It is further submitted that this remedy should not be granted to the plaintiff because there are other remedies available to it, namely, (a) that it could apply to the Legislature to have the rights of the public extinguished; (b) that it could take proceedings under the provisions of The Municipal Act, R.S.O. 1937, c. 266, to have this particular portion of the highway closed; or (c) that it could take proceedings under the provisions of The Land Titles Act, R.S.O. 1937, c. 174, but the particular nature of an application under the latter statute was not indicated. The answer to these contentions would seem to be, first, that legislative action would not be a court proceeding, and that if the plaintiff were to follow the other courses suggested it would be forced to admit that, to the extent mentioned, its property was subject to the rights of the public for use as a highway. I cannot agree with these submissions of the defendant corporation, nor do I find in any of the circumstances disclosed in evidence any reason whatsoever for withholding from the plaintiff the declaration for which it asks, and to which I deem it clearly entitled. I cannot conceive of a more convenient method of having this question of difference between the parties determined than in an action of this kind. In *Maccoomb et al. v. Town of Welland*, *supra*, a similar declaration was claimed by the plaintiff and the Court of Appeal did not take issue with the form of the action. If the plaintiff were applying to have a highway closed, or the public right in a highway extinguished, then obviously an action of this kind would not be the proper procedure, but this is not the case.

The City also contended that the memorial of 1820 was a charitable trust, and, that being so, there were always some

beneficiaries who would not be *sui juris*, and their rights could therefore not be barred. Undoubtedly a gift to trustees for the benefit of the public to use the subject matter of the gift for highway purposes could be regarded as a charitable trust, but viewed strictly in that character, and quite apart from its status as a highway, such a trust in favour of the public with respect to the lands in question for highway purposes could be effectively barred by The Limitations Act, R.S.O. 1937, c. 118: see ss. 3, 4, 45, 46 and 47. It is not, however, necessary to determine this question, having regard to the views expressed by me on the other points raised in the action.

There remains to be determined the rather troublesome question raised in the defence of the defendant the Attorney-General for Ontario. The reason why the plaintiff joined the Attorney-General for Ontario as a defendant in this action has been mentioned above. A motion was made on behalf of the defendant the Attorney-General for Ontario to have his name struck out of the proceedings, but the learned judge who heard the motion dismissed it, holding that this was a proper question to be determined by the judge presiding at the trial of the action.

Counsel for the Attorney-General refers to s. 454 of The Municipal Act, which reads as follows:

"454.—(1) Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this or any other Act.

"(2) In the case of a dedicated highway such vesting shall be subject to any rights in the soil reserved by the person who laid out or dedicated the highway."

Counsel says that inasmuch as the soil and freehold of the highway has by virtue of this enactment become vested in the Corporation of the City of Toronto the Attorney-General is not a proper party in any view of the matter whatsoever. He refers to the decision of Hope J. in *Big Point Club v. Lozon et al.*, [1943] O.R. 491, [1943] 4 D.L.R. 136, where at p. 495 the learned judge states:

"Ownership of highways is held by municipalities in trust for all such of the King's subjects as have occasion to make use of them for purposes of communication or for other lawful pur-

pose, or in order to gain access to or egress from adjacent lands.”

Counsel for the Attorney-General also referred to the reasons for judgment of Rinfret J. (as he then was) in *City of Vancouver v. Burchill*, [1932] S.C.R. 620 at 625, [1932] 4 D.L.R. 200, where the learned justice stated:

“The land-owner enjoys the absolute right to exclude anyone and to do as he pleases upon his own property. It is idle to say that the municipality has no such rights upon its streets. It holds them as trustee for the public. The streets remain subject to the right of the public to ‘pass and repass’; and that character, of course, is of the very essence of a street.”

I do not believe that by using this phraseology the learned justices meant to lay down as a proposition of law that the municipalities were in a strict sense trustees for the general public whose rights were legally vested in the municipalities as such. This was only a manner of expression which must not be given a meaning extended beyond the immediate purposes of the case in which it was used. Clearly, a municipal corporation is a statutory body, and enjoys only such rights, powers and privileges as are conferred upon it by statute, and while the statute vests the soil and freehold of every highway in the municipal corporations exercising jurisdiction over them, the statute has not gone so far as to say that a municipality should represent the Crown as *parens patriae* to protect and enforce the paramount right of all His Majesty’s subjects to pass and repass over lands which have become common or public highways.

Reference was also made by counsel for the Attorney-General for Ontario to the following cases: *Attorney-General for Ontario v. Canadian Wholesale Grocers Association*, 53 O.L.R. 627, [1923] 2 D.L.R. 617, 39 C.C.C. 53, and particularly to the reasons for judgment of Meredith C.J.O. at p. 641; also to *Smith v. Attorney-General for Ontario*, 53 O.L.R. 572, [1923] 4 D.L.R. 1071, affirmed [1924] S.C.R. 331, [1924] 3 D.L.R. 189, 42 C.C.C. 215, with particular reference to the reasons for judgment of Orde J. at p. 581. I do not think that either of these cases is in point, because clearly the declaratory remedy which is sought by the plaintiff in this action is sought *bona fide* to establish for all time, and not only against the Corporation of the City of Toronto, but also as against the

public at large, its claim to the lands in question freed and discharged of any claim of a right to a highway thereon.

I do not see what advantage can be claimed by the Attorney-General for Ontario by reason of the decision in *The Town of Guelph v. The Canada Company* (1854), 4 Gr. 632, as in that case the action for nuisance brought by the municipality was brought by it because of its peculiar interest in the marketplace there in question, and because it had suffered, or was about to suffer, damage peculiar to it in its capacity as a corporate entity.

In the case of *Maccoomb et al. v. Town of Welland*, *supra*, Meredith J.A. stated, at p. 347, that the Attorney-General was not a necessary party in that action, but he pointed out that the action was substantially to prevent the defendant municipality from trespassing upon the plaintiffs' land. He proceeded:

"A judgment against the defendants will bind the defendants only; if all rights in public ways are not vested in them, such a judgment would not prevent any one of the public taking the proper steps to enforce public rights, or to punish any criminal interference with them; whilst, if all rights were vested in the defendants, the Attorney-General would be an improper party to the action."

I have also considered the decisions in *The Duke of Bedford v. Ellis et al.* [1901] A.C. 1, and *Hunter et al. v. The Attorney-General and Hood*, [1899] A.C. 309 at 325.

As a rule the Attorney-General is a necessary party to all actions relating to charities. It is the duty of the King, as *parens patriae*, to protect property devoted to charitable uses, and that duty is executed by the Attorney-General as an officer who represents the Crown for all forensic purposes. He represents the beneficial interest, in other words, the objects of the charity. Even if all the subscribers to a charitable fund are made plaintiffs, an action for the regulation of the charity is defective unless the Attorney-General is also a party: 4 Halsbury, 2nd ed. 1932, p. 379, para. 676.

The Attorney-General, as custodian of the rights of the public, can maintain an action for an injunction to restrain the commission of a nuisance to a highway or for a mandatory injunction directing its abatement, and in such an action no actual injury need be proved; but a member of the public can only maintain an action for damages or an injunction in respect of

such a nuisance if he has sustained therefrom some substantial injury beyond that suffered by the rest of the public: 16 Halsbury, 2nd ed. 1935, p. 364, para. 487.

The position of the Attorney-General with reference to property devoted to charitable uses is analogous in many respects to his position as custodian of the rights of the public with respect to highways. There are, of course, many actions in which the Attorney-General has taken proceedings to enforce the public rights in that respect. Reference is made to *Attorney-General v. Shrewsbury (Kingsland) Bridge Company* (1882), 21 Ch. D. 752; *The Attorney-General v. Boulton* (1874), 21 Gr. 598; *Municipality of Saugeen v. The Church Society* (1858), 6 Gr. 538; *The Queen v. Donaldson et al.*, *supra*; *Dyson v. Attorney-General*, [1911] 1 K.B. 410.

I fail to apprehend why the Attorney-General cannot be sued as the representative of the Crown in its capacity as *parens patriae*, when clearly he is charged with the enforcement of such rights. Why, if he has the right to prosecute, is he not the proper party to defend such rights at the suit of anyone who calls them into question?

Before the office of the Public Trustee was created, the Attorney-General for Ontario represented the public interest in any suits involving charitable trusts. Counsel for the plaintiff stated during the hearing that the Public Trustee was consulted as to whether or not he desired to be joined as a party to this action and intimated that it was not necessary to join him as a party, in view of the fact that the Attorney-General for Ontario was already a party. It is also stated by counsel that in the office of the Master of Titles at Toronto, a certificate of ownership is not granted for any property, freed and discharged of any claims to right of highway over them, and that if such a certificate of ownership is desired, it will only be granted after notice has been given to the Attorney-General for Ontario. This practice, it would seem, has been consistently followed for a great many years, and the Attorney-General for Ontario does not appear to have taken any exception to it, although it is stated he does not now appear in response to the notice as was done by a prior incumbent of the office. There is nothing conclusive about this course of practice, however, and my conclusion has not been affected by it in any manner whatsoever.

If a judgment were granted in this case against the City only, the City not being the custodian of the paramount rights of the public over a highway, the judgment would be binding upon the City only and the question of the rights of the public would be left outstanding. I hold not only that it was proper for the Attorney-General for Ontario to be joined as a party defendant in this action, but that the plaintiff in doing so was taking only such action as was necessary to bring all the interested parties before the Court. Counsel for the Attorney-General suggests that it is inconvenient to the Attorney-General to be brought in as a party in actions of this kind. If that is so, the inconvenience can easily be removed by legislative action, giving the municipalities power to represent and bind the rights and interests of the general public with respect to property which has become devoted to highway purposes.

I therefore direct that judgment be entered in favour of the plaintiff against both defendants for a declaration as asked in the plaintiff's statement of claim, together with the costs of the action to be paid by the defendant municipal corporation. The plaintiff is, of course, entitled to only one set of costs, and it shall not be entitled to have costs as against the Attorney-General for Ontario. I have carefully considered the position of the defendant, the Attorney-General for Ontario, with respect to the question of costs. For the reasons mentioned I have held that he was a proper and necessary party to the action. At the trial he took no part in the contest, except to contend that he had been improperly joined as a party defendant, the defendant corporation conducting the defence of the action throughout. While the defendant corporation has been unsuccessful in the action, I do not feel that it should be called upon to pay the costs of the Attorney-General, who submitted the rights of His Majesty, as representing the public interest, to the Court. In all the circumstances, I take the view that there should be no order as to the Attorney-General's costs.

Judgment accordingly.

Solicitor for the plaintiff: H. A. Harrison, Toronto.

Solicitor for the City of Toronto, defendant: W. G. Angus, Toronto.

Solicitor for the Attorney-General, defendant: C. R. Magone, Toronto.

[COURT OF APPEAL]

Pfister v. Toronto Transportation Commission

Railways—Negligence—Shelter Built for Accommodation of Street-car and Bus Passengers—Overhang of Street-cars when Travelling Around Loop—Warnings—Findings of Jury—Negligence of Plaintiff—The Negligence Act, R.S.O. 1937, c. 115.

The defendant maintained a "shelter" for street-car and bus passengers, consisting of a paved area covered by a canopy and adjacent to the street-car right-of-way. A line of coloured bricks in the pavement marked the limit of the "overhang" of a street-car in turning around a loop in the track. The plaintiff, who was familiar with the area, was waiting for a street-car, and, seeing one approaching, turned her back to it in order to walk to where she thought it would stop. While so walking, she was struck by the street-car and injured. The jury found that the defendant had been negligent in that the line of bricks was not sufficient to indicate the amount of the overhang and that there should have been signs or other notices that the line of bricks denoted an area of danger. They further found that the plaintiff had been negligent in misjudging the distance from the street-car track. They apportioned the fault 95 per cent. against the defendant and 5 per cent. against the plaintiff. The defendant appealed.

Held, the action must be dismissed. The jury's findings had impliedly exonerated the defendant of all negligence in the operation of the street-car, which had been alleged in the statement of claim, and there was nothing in the evidence to support the conclusion that the matters which had been found as negligence contributed in any way to the accident, or that they constituted negligence in law. On the other hand, the jury had said that the plaintiff had been negligent, and that was an end of the case.

Negligence—Dangerous Premises—Duty to Invitee—Necessity that Invitee Take Reasonable Care for Own Safety.

Per LAIDLAW and HOGG J.J.A.: It is an essential condition of liability under the rule in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; L.R. 2 C.P. 311, that the plaintiff shall himself have used reasonable care for his own safety. If that is not shown, but, on the contrary, the plaintiff's own negligence is shown to have been responsible for the injury, there can be no recovery. *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74, and other authorities, applied.

Per HOGG J.A.: This rule, in the circumstance of this case, is not affected by the provisions of The Negligence Act.

Trials—Jury Trial—View of Locus—Proper Directions to Jury—Presence of Judge and Counsel—The Jurors Act, R.S.O. 1937, c. 108, s. 87—Rule 266.

Per LAIDLAW J.A.: The purpose of a view by the jury of the scene of an accident is not to enable the jury to make investigations of their own, or to obtain additional evidence, but to assist them to a better understanding of the evidence given in the court room. Although it is not essential, it is desirable that the presiding judge and counsel for all parties should be present when the view is taken. An application for an order directing a view should be made in the absence of the jury; otherwise it may result in embarrassment and possible prejudice to a party who desires to oppose it.

AN APPEAL by the defendant, and a cross-appeal by the plaintiff, from the judgment of Kelly J., entered upon the findings of a jury.

18th February 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and HOGG JJ.A.

Irving S. Fairty, K.C., for the defendant, appellant: There was no necessity for a warning to the plaintiff; she must have known that the street-car would swing out, and she must have put herself into a place of danger. The duty towards an invitee is only to see that the premises are reasonably safe: 23 Halsbury, 2nd ed. 1936, p. 604; Salmond on Torts, 10th ed. 1945, p. 479. We were entitled to a non-suit: *Newton v. City of Brantford* (1910), 1 O.W.N. 965, 16 O.W.R. 555; *Parker v. Dymont-Baker Lumber Co.* (1914), 6 O.W.N. 559, 26 O.W.R. 486; *Bay-Front Garage, Limited v. Evers et al.*, [1944] S.C.R. 20, [1944] 1 D.L.R. 433.

A non-suit was granted, *non obstante veredicto*, in the following similar cases: *Arnold v. Stothers* (1910), 1 O.W.N. 829, 16 O.W.R. 234; *Beckerton v. Canadian Pacific R.W. Co.* (1914), 6 O.W.N. 158, affirmed, 7 O.W.N. 51; *Keech v. Sandwich, Windsor and Amherstburg R.W. Co.* (1915), 8 O.W.N. 96, 22 D.L.R. 784; *Westenfelder v. Hobbs Manufacturing Co. Ltd.* (1925), 57 O.L.R. 31; *Norman v. Great Western Railway Company*, [1915] 1 K.B. 584.

The trial judge was wrong in holding that the rule in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, affirmed (1867), L.R. 2 C.P. 311, has been modified by the provisions of The Negligence Act, R.S.O. 1937, c. 115. There is no connection. *Indermaur v. Dames* lays down the duty of an occupier towards an invitee, but does not deal with contributory negligence. The obligation of the defendant here was to guard against dangers which might reasonably be anticipated; it was not required to guard against every possible danger. The evidence of the safe use of these premises by thousands of persons without accident is irrefutable evidence that they were safe: *Dent v. Central Canada Exhibition Association et al.*, [1935] O.W.N. 419; *Delaney v. The King*, [1941] 3 D.L.R. 217.

There was no duty on us which was not discharged, and there was consequently no negligence on our part, and there is no room for the application of The Negligence Act.

There was no invitation to the plaintiff to use the premises as she did. The use of premises by an invitee is limited to those parts of the premises where he may reasonably be expected to

go, and to their use in an ordinary and reasonable way: *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253. The findings against us do not constitute negligence in law.

There are numerous American decisions respecting liability for the overswing of a street-car. I refer particularly to *Ferguson v. Kansas City Public Service Co.* (1945), 156 Pac. (2d) 869, and the annotation in 55 A.L.R. 479 (1928).

A jury has no right to impose an unreasonable standard of care: *Metropolitan Railway Company v. Jackson* (1877), 3 App. Cas. 193; *Mayes v. Toronto Transportation Commission et al.*, [1942] O.W.N. 271; *Anderson v. Canadian National Railway Company*, [1944] O.R. 169, 56 C.R.T.C. 379, [1944] 2 D.L.R. 209.

We are entitled at the least to a new trial, on the ground that the award of damages is excessive. The jury must have proceeded upon a wrong principle, or been actuated by an improper motive, as is further shown by their apportionment of liability.

R. R. McMurtry, K.C. (*Norman B. McPherson*, with him), for the plaintiff, respondent: There was an abundance of evidence to support the findings of negligence against the defendant, and they are well founded in law. [ROBERTSON C.J.O.: Where is there evidence of any invitation to go and stand near an oncoming street-car? No one could think his invitation was to stand on the extreme edge of the platform.] There is a duty to people who are invited to come upon the platform. [ROBERTSON C.J.O.: They must take some care for themselves.] [LAIDLAW J.A.: What could the absence of warning signs have to do with the accident, in view of the finding that the plaintiff misjudged the distance from the track? She was engrossed in conversation, and was paying no attention to her surroundings.] She would not have misjudged the distance had there been proper warning signs. Despite any finding of contributory negligence, we are entitled to recover in accordance with the provisions of The Negligence Act: *Whitehead v. City of North Vancouver*, 53 B.C.R. 512, [1939] 1 W.W.R. 369, [1939] 3 D.L.R. 83; *Greisman v. Gillingham et al.*, [1934] S.C.R. 375, [1934] 3 D.L.R. 472; *Letang v. Ottawa Electric Railway Company*, [1926] A.C. 725 at 731, [1926] 3 W.W.R. 88, 41 Que. K.B. 312, 32 C.R.C. 150, [1926] 3 D.L.R. 457.

There was nothing in the conduct of the trial which would warrant the granting of a new trial.

Irving S. Fairty, K.C., in reply.

Cur. adv. vult.

29th March 1946. ROBERTSON C.J.O.:—I agree that this appeal should be allowed, with costs, and the action dismissed with costs.

In my opinion the answers of the jury in absolving the appellant from any negligence in the operation of the street-car that struck the respondent, and in finding the respondent in part responsible for her injuries by “misjudgment of distance from street-car track”, are matters of the first importance. The only negligence found by the jury on the part of the appellant was that the line of bricks on the pavement was not sufficient to indicate the amount of overswing of a street-car to waiting passengers, and the lack of signs, or other notice, that the line of bricks denoted the area of danger. The charge of negligence in respect of these matters was not introduced into the statement of claim until the opening of the trial, and it would be difficult to find in the evidence anything to support the conclusion that the matters indicated by the jury in their answer were in any way responsible for the respondent’s injuries.

I am further of the opinion that the evidence does not justify a finding that there was any hidden or concealed danger upon the appellant’s premises that constituted a trap. Any mature person, when waiting for a street-car, ought to know enough to keep out of the way of an approaching street-car. The respondent, on her own admission, was strolling about with her back to the approaching street-car, heedless of where she was walking. In this regard the jury have said she was negligent. I cannot find that there is any evidence on the record to warrant the answer of the jury in respect of the matters they considered insufficient or lacking in the way of warnings to waiting passengers. The respondent was quite familiar with the premises. The jury have, by their answer, negated the charges of negligence in respect of the operation of the appellant’s street-car on this occasion, and I cannot see that there is anything left of the respondent’s case.

LAIDLAW J.A.:—The defendant appeals from a judgment of Kelly J., dated the 22nd day of October 1945. The action is for

loss and damages suffered by the respondent and alleged to have been caused by negligence of the appellant. The writ of summons was issued in the County Court of the County of York, and the amount of damages first claimed was \$750. By an order of His Honour Judge Barton the respondent was granted leave to amend the statement of claim by increasing the amount of damages claimed to \$2,000. The appellant then disputed the jurisdiction of the County Court, and the proceedings were thereupon moved into the Supreme Court of Ontario. The trial was had with a jury, and in answer to certain questions quoted below the jury found the appellant to be 95 per cent. at fault and the respondent 5 per cent., and assessed the total damages of the respondent at the sum of \$3,302.50. The respondent made application to the presiding judge for leave to amend the statement of claim further by increasing the amount of her claim to the total amount of damages as assessed by the jury. The application was refused, and judgment was given for the respondent for \$1,900 and costs.

The accident occurred about half past seven o'clock in the morning of the 26th May 1944, on premises of the appellant used as a railway station or terminal, and lying between Bathurst Street on the east and Vaughan Road on the west, and a short distance south of St. Clair Avenue, in the city of Toronto. The premises consist of a canopy or roof, supported by pillars, commonly called a shelter, and a paved concrete area below the roof and extending in all directions. This paved area is used by passengers of the appellant as a platform for getting on and off, and while waiting for, street-cars and buses using the terminal. On the south side the pavement adjoins the railway right-of-way on the same level. The surface of the right-of-way is described as asphalt. It is of a darker colour than the concrete area, and there is a line of red brick embedded flush with the surface and about 3 inches wide. The line of bricks is intended to mark the line traced by the body of a street-car as the car moves around the curve of a so-called loop of the railway tracks on the right-of-way. The distance from the line of bricks to the nearest rail varies from 2 feet to 5 feet, and at one place the rear end of a street-car, as it moves around the loop, extends 1 inch to the north of the south edge of the line of bricks, according to a plan filed by the appellant, or 2 inches north of

the north edge according to the measurement made by a surveyor called as a witness on behalf of respondent.

On the day of the accident the respondent came to the premises with the intention of boarding a south-bound street-car, in accordance with her daily practice of almost five months. She entered from Bathurst Street on the east, and walked westerly on the platform until she was a short distance west of the shelter. She met a companion, Mrs. Behan, at that place. Both of them saw the street-car approaching from Bathurst Street and entering the loop. They concluded that the street-car would stop for passengers at a place further west than where they were standing. They turned their backs on the approaching street-car and commenced to walk westerly. The respondent was on the south side of Mrs. Behan, and closer to the railway tracks. When she had walked 10 or 12 steps she was struck down by some part of the body of the street-car as it was moving around the curve. The respondent was unable to state in what manner the accident occurred, but the evidence of Mrs. Behan indicated that the rear end of the street-car struck the respondent.

The jury answered questions submitted to them by the learned trial judge as follows:

"1. Were the injuries suffered by the plaintiff caused or contributed to by any negligence on the part of the defendants or their servants? Answer Yes or No. A. Yes.

"2. If your answer to the first question is 'Yes', then in what did such negligence consist? Answer fully. A. 1. Line of bricks is not sufficient to indicate amount of overswing of street-car to waiting passengers. 2. Lack of signs or other notice that the line of bricks denotes area of danger.

"3. Were the injuries suffered by the plaintiff caused or contributed to by any negligence on the part of the plaintiff? Answer Yes or No. A. Yes.

"4. If your answer to the third question is 'Yes', then in what did such negligence consist? Answer fully. A. 1. Misjudgment of distance from street-car track.

"5. If you find that the plaintiff's injuries were caused or contributed to by the negligence of both the plaintiff and the defendant, or its servants, then in what proportion do you determine the degree of fault of each? A. The plaintiff, 5%. The defendant, 95%.

"6. In what amount do you assess the total damages of the plaintiff? A. \$3,302.50."

It is to be observed at once that the jury did not find any negligence on the part of the motorman in the operation of the street-car involved in the accident. In the statement of claim it was alleged that the accident was due to the negligence of the motorman, and that the negligence consisted of the following acts and omissions:

- (a) failure to stop at the regular stopping place;
- (b) proceeding around the loop without warning and striking the plaintiff;
- (c) failure to slacken speed or to bring his car to a stop when he saw, or ought to have seen, passengers in a position where they might be struck by the car;
- (d) failure to give warning to the plaintiff that an accident was about to occur;
- (e) failure to keep a proper look-out;
- (f) failure to avoid an accident when he saw, or ought to have seen, that an accident was about to occur.

At trial the respondent amended the statement of claim with leave granted by the learned trial judge, by adding thereto the following paragraph:

"The defendant was further negligent in that it maintained a boarding place or platform for passengers which was so constructed, by reason of the over-swing of the tramcars using said loop, as to constitute a dangerous trap to persons or passengers lawfully using the said boarding place or platform."

It must be taken that the jury considered each of the particular acts or omissions set forth in the statement of claim, and exonerated the appellant from liability in respect of all acts or omissions not included in their finding: *Andreas v. The Canadian Pacific Railway Company* (1905), 37 S.C.R. 1, 5 C.R.C. 450.

Two questions arise in this appeal: first, was there any evidence of negligence on the part of the appellant; secondly, was there evidence of negligence that caused the accident?

It is an elementary and familiar principle that negligence in law must be a fault which corresponds with a duty owing by one person to another, and which causes or contributes to the loss or damage for which claim is made. What was the duty of the appellant toward the respondent under the particular circumstances? Counsel for the respondent stresses that the appel-

lant was in the position in law of an occupier of premises and the respondent was an invitee thereon at the time of the accident. The duty of railway companies towards persons resorting to their stations in the ordinary course of business has been stated to be this: “ . . . to take reasonable care that their premises were reasonably safe for persons using them in the ordinary and customary manner and with reasonable care.” *Norman v. Great Western Railway Company*, [1915] 1 K.B. 584 at 594, 598.

Was the respondent at the time of the accident using the premises of the appellant “in the ordinary and customary manner and with reasonable care”? She saw the street-car entering the loop from Bathurst Street. She knew that it must necessarily move around the curve. She knew that it would probably pass her before coming to a stop. She knew, or ought to have known, that she was close to the railway tracks. Nevertheless she deliberately turned her back on the approaching street-car and proceeded without any further attention to it. She testified that she did not know where she was with reference to the line of bricks marking the boundary of the railway right-of-way, and it is obvious that some part of her body was to the south of that line at the time of the accident.

It is quite certain in my mind that the respondent was not exercising reasonable care immediately before and at the time of the accident. This conclusion is fortified, and indeed made conclusive, by the finding of the jury that there was negligence on the part of the respondent consisting of “misjudgment of distance from street-car track”. The duty of the invitor towards the invitee, as stated by Willes J. in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 at 288, affirmed (1867), L.R. 2 C.P. 311, and repeatedly cited in subsequent cases, is this: “And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know”. It is essential to the application of the rule that the invitee use reasonable care on his part for his own safety. That essential is lacking in this case.

Again, and in any event, it is my view that the evidence does not show that there was a failure on the part of the appellant to take reasonable care that its premises were reasonably safe. Railway companies must maintain facilities and provide proper

accommodation for their passengers; but it is not the duty of a railway company to make such facilities and accommodation absolutely safe. I cannot accept, as a general principle, that the omission on the part of a railway company to have signs or other notices to denote the area of danger from a moving car, or a finding of insufficiency of a line of bricks to denote such an area, constitutes negligence in law. In the circumstances of this case the evidence given by an expert called on behalf of the respondent shows that the area used as a platform and the portion of premises used as a right-of-way are clearly distinguishable, apart altogether from the line of bricks denoting the dividing line. On this point it is of much importance to note the evidence that in the course of a week between 48,000 and 50,000 passengers used the premises. A supervisor who had been employed by the appellant at that terminal for a period of 70 weeks calculated that about 3,500,000 people had used the premises without one single accident, to his knowledge. In the light of that evidence I think it cannot be said that the premises were not reasonably safe for persons using them in the ordinary and customary manner and with reasonable care.

Even if the fault on the part of the appellant, as found by the jury, could be regarded as negligence in law, nevertheless, in my view, the action must fail because the respondent has not proved that the accident was due to those causes, or either of them. The premises were themselves safe, and the accident did not arise from anything connected with the premises themselves. The peril which resulted in the accident to the respondent arose from the moving street-car. The jury have exonerated the employees of the appellant from all negligence in respect of such operation. Moreover, if I had to determine the real cause of the loss and damage suffered by the respondent—which I have not—I should have no hesitation in finding that the sole cause was the negligence of the respondent: *Norman v. Great Western Railway*, *supra*, at p. 594; *Canadian National Railways Company v. LePage (Lesage)*, [1927] S.C.R. 575 at 581, [1927] 3 D.L.R. 1030. It is sufficient for me to say that there was no evidence of any breach of duty owing in law by the appellant to the respondent, which caused or contributed to the loss complained of.

Before leaving this case I desire to make certain observations on one incident of the proceedings. During the cross-

examination of one of the witnesses called on behalf of the respondent counsel for the appellant stated in the presence of the jury that he intended to ask the presiding judge to direct the jury to take a view of the premises. Subsequently an application was made and counsel for the appellant offered to have the same street-car, or a similar one, as was involved in the accident available at the site at the time of the proposed inspection by the jury. Counsel for the respondent agreed to the making of an order for a view by the jury. The learned judge thereupon made the order, and in doing so told the jury that they could make their own investigation "as to whether this is a dangerous loop or not", and that they could make "whatever investigations you think are necessary". The learned judge apparently did not attend at the time the view was had by the jury, and expressed the opinion "that certainly the judge should not be there". Counsel for the appellant was also absent. I do not say that the presence of the presiding judge or of counsel is essential at the time a view is taken by the jury in a civil case, but the judge may be present if he so desires: Rule 266. I think that it is advisable for him to do so, and also for counsel for all parties to be present. I point out too that it was not the function of the jury to make investigation "as to whether this is a dangerous loop or not". The purpose of a view by the jury is in order to obtain a "better understanding of the evidence": The Jurors Act, R.S.O. 1937, c. 108, s. 87. It is not to obtain evidence, and the view had by a jury is not evidence in a case. With much respect, I think that the jury would not have had any difficulty in thoroughly understanding the evidence in this case without a view of the premises. Generally a view by a jury of the site of an accident is unnecessary and does not help them to reach a proper verdict. On the contrary, in my opinion, it not infrequently leads to a misuse of the occasion to supplement the evidence, rather than for the limited purpose of better understanding the evidence. I also express the view that an application to the presiding judge for an order directing a view ought to be made in the absence of the jury. Unless that is done there is danger of embarrassment and possible prejudice to a party who desires to oppose the application.

I do not rest my judgment in any way upon the matter of the view taken by the jury of the premises, although I strongly suspect that their findings were influenced by it. Apart from

that consideration, it is my opinion that the appeal ought to be allowed with costs, for the reasons I have given. The judgment of the Court below will be set aside and in place thereof judgment will be entered dismissing the action with costs.

HOGG J.A.:—The essential facts are set out in the reasons for judgment of my brother Laidlaw.

It seems to me that the question for consideration may be put in this manner: Do the circumstances found by the jury to exist, and which they claim establish negligence on the part of the appellant, constitute negligence at law? In other words, was there any duty, under all of the circumstances present, imposed upon the appellant to indicate to waiting passengers the area affected by the overswing of the street-car?

It was said by Lord Atkinson in *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74 at 86, that the well-known passage in the judgment of Willes J. in *Indermaur v. Dames*, *supra*, at p. 288, has for the last fifty-six years been accepted as a full and accurate statement of the law.

Elements that are essential in establishing the rights and duties of the parties under the rule referred to in *Indermaur v. Dames* are, that the plaintiff, "using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know".

With reference to danger of an unusual nature, the fact that there was a curve in the tracks in close proximity to the place where the street-cars were accustomed to stop was a circumstance which could be clearly seen by all persons using the street-cars at the area in question. That the body of a street-car over-swings when going around a curve occurs, and can be seen, at every corner in the city where street-cars turn from one street into another. There is nothing unusual about such an occurrence, and it cannot in my view be regarded as an unusual danger. The overswing of a street-car in proceeding round a curve is one of the ordinary and usual factors in the operation of street-cars.

The words of my Lord the Chief Justice in *Anderson v. Canadian National Railway Company*, [1944] O.R. 169, 56 C.R. T.C. 379, [1944] 2 D.L.R. 209, may be applied to the present case: "There were . . . no unusually dangerous operations

being carried on by the appellants at the time of the accident". Also the language of Middleton J.A. in *Westenfelder v. Hobbs Manufacturing Co. Ltd.* (1925), 57 O.L.R. 31, is apt in its application to the present case: "It was not an unexpected danger, of which the plaintiff was ignorant, but which was known to the defendants. It was patent to everyone."

In the *Fairman* case, *supra*, Lord Atkinson quoted with approval the following passage from *Indermaur v. Dames*: "... there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business."

The fact that there is evidence that not only thousands, but several millions, of persons used the premises in question over a lengthy period without accident is weighty evidence in support of the conclusion that the premises are reasonably safe for one who uses reasonable and ordinary care: the *Fairman* case, *supra*, at p. 87; *Kester v. The City of Hamilton*, [1937] O.R. 420, [1937] 2 D.L.R. 330.

The finding of the jury in their answer to the second question put to them imputes no negligence to the respondent on which legal liability can be charged against it and upon which an action can be maintained. In my opinion there is no evidence upon which a finding of negligence in law can be upheld against the respondent.

There is the further question, namely, whether the respondent used reasonable care on her own part for her own safety. The jury found that she misjudged her distance from the street-car. This must mean that she, knowing she must not stand within a certain distance of the track, nevertheless did so.

To bring a case within the principle of *Indermaur v. Dames*, *supra*, it is essential that the injured person must not have had knowledge of the existence of the danger causing the injury. If a person knows of the risk, there is no cause of action: *Cavalier v. Pope*, [1906] A.C. 428.

I am bound to conclude that the evidence shows the respondent did not use that reasonable care referred to in *Indermaur v. Dames*, and required under the circumstances.

The learned trial judge was of the opinion that the effect of the rule in *Indermaur v. Dames* has been modified by The Negligence Act, R.S.O. 1937, c. 115, and that a plaintiff, seeking

damages for an injury, is not barred from recovery in some measure because such plaintiff has not used reasonable care. He cited the judgment in *Greisman v. Gillingham et al.*, [1934] S.C.R. 375, [1934] 3 D.L.R. 472, in support of this view.

With respect for the opinion of the trial judge, I do not think the facts of the present case are such that the provisions of The Negligence Act are relevant. The Act entitles a plaintiff to recover damages although he was guilty of contributory negligence, but to the extent he was to blame, he is obliged to suffer the loss himself. The damages are to be apportioned in proportion to the degree of negligence found against the parties respectively. No negligence in law has been found against the appellant, and therefore there is no question of damages being apportioned between the parties: see *Stark v. Batchelor*, 63 O.L.R. 135, [1928] 4 D.L.R. 815.

I agree that the appeal should be allowed with costs and the action dismissed with costs.

Appeal allowed with costs and action dismissed with costs.

Solicitor for the plaintiff, respondent: Norman B. McPherson, Toronto.

Solicitor for the defendant, appellant: Irving S. Fairty, Toronto.

[McRUER C.J.H.C.]

[COURT OF APPEAL.]

Regal Films Corporation (1941) Limited v. Glens Falls Insurance Company.

Insurance—Fire—Policy Protecting against Several Forms of Loss, including Loss by Fire—Applicability to Loss by Fire of Part IV of The Insurance Act, R.S.O. 1937, c. 256—Notice and Proofs of Loss—Variation of Statutory Conditions—Ss. 1(23), (39), 101, 106, 109, stat. con. 15.

It is not permissible for an insurer, by including in a policy several risks, some of which do, and some of which do not, come within Part IV of The Insurance Act (fire insurance), to escape the provisions of Part IV in respect of a primary risk coming within it.

The defendant issued a policy protecting the plaintiff against loss by fire, lightning, windstorm, cyclone, tornado, theft, robbery, burglary, hail, explosion, etc. The policy was headed "Inland Marine Policy". A loss by fire occurred, and a claim was made under the policy, which was resisted on the ground that the plaintiff had not furnished proofs of loss within the time stipulated in the policy.

Held, since the policy condition differed from statutory condition 15 under s. 106 of the Act, and since the policy, so far as this loss was concerned, should be regarded as a policy of fire insurance (*Staples v. Great American Insurance Company, New York, [1941] S.C.R. 213*, distinguished), the statutory condition was applicable, and, the plaintiff not having violated that condition, the defence must fail.

It is a question of fact in each case, to be decided according to the circumstances of the case, whether an insured has furnished proofs of loss as soon as is reasonably practicable after the loss, as required by statutory condition 15 in case of fire insurance.

AN APPEAL by the defendant from the judgment of McRUER C.J.H.C., set out below.

11th February 1946. The action was tried by McRUER C.J.H.C. without a jury at Toronto.

C. F. H. Carson, K.C., and *J. G. Middleton*, for the plaintiff.

D. L. McCarthy, K.C., and *J. H. Amys*, for the defendant.

12th February 1946. McRUER C.J.H.C. (orally):—This is an action brought by the plaintiff to recover the sum of \$26,106.37 from the defendant, said to be the amount of a loss suffered due to a fire which occurred on the 17th November 1943.

The claim is made under a policy of insurance placed by the defendant on property owned by the plaintiff or in which it had an interest. At the time of the fire the property alleged to have been damaged was on premises occupied by the plaintiff situated at 277 Victoria Street in the city of Toronto.

No question arises with respect to the fire, nor does any question arise with respect to the amount of the loss.

On the 18th November 1943 the defendants engaged the firm of Edwards & Angas Limited to adjust the loss on their behalf. Mr. Pelton of that firm, in response to a telephone call from one Mr. Blair of a firm of insurance brokers known as Irish & Maulson Limited, went to the premises in question. It appears, and it is so alleged in the defendant's pleading, that Irish & Maulson Limited were the plaintiff's brokers who had placed the insurance with the defendant.

When Mr. Pelton arrived at the premises he there met one Rice from the claims department of the defendant. Mr. Pelton says, and I so find, that they there together looked over the damaged premises and met Mr. Alexander, who was an employee of, or, at least represented, the plaintiff. The witness Pelton says that Mr. Rice introduced him to Mr. Alexander, stating, "This is Mr. Pelton of the firm of Edwards & Angas, who will adjust this claim representing the Glens Falls Insurance Company."

Mr. Pelton proceeded then with the adjustment. He says that he and Alexander discussed the matter, and that there were two methods of adjustment that might have been followed. The one method was to make an appraisal of the loss and to put in a claim for the amount of the appraised loss. The other method was to prepare an inventory and allocate the contents for repair and replacement, and ultimately to adjust the loss on the basis of the cost of repair and replacement.

Pelton says that Alexander and he worked jointly preparing an inventory and allocating the contents for repair, that the cost of repairs was tabulated and an inventory was made of the destroyed contents. He says that he was constantly in touch with the defendant company and that this procedure extended from December 1943 to August 1944, when he settled the amount of the loss with Mr. Rice and Mr. Alexander at \$26,106.37. He says, "We agreed that this was the fair amount of the loss."

On 4th August 1944 Pelton reported to the defendant, and sent a copy of his report to the insurance brokers, Irish & Maulson Limited, who had first advised him of the loss, stating that he was enclosing proofs of loss for a claim of \$26,106.37. Although this report, which is ex. 10, was dated 4th August, the evidence shows that it was not sent until some time later

in, or near the end of, August, due to the fact that Mr. Pelton had been on holidays. He said he had dictated the report before he left for his holidays but it had not gone forward.

In this report Mr. Pelton states: "Immediately following this fire we met with officials of Regal Films and together a definite program was set up in order to handle the loss to the best possible advantage. The primary consideration was of course to remove the salvable items of equipment to a place of safety because following the fire the basement was deeply filled with debris and water and a similar condition existed on the ground floor."

He goes on to say: "The adjustment of this loss has extended over the last eight months, during which time it was necessary to have repeated interviews with your assured. There was a considerable delay in the production by the assured of the final list of damages, due to the fact that many of the items had to be repaired, and consequently the assured, quite naturally, refused to discuss final details in that regard, until they knew exactly with what figures of cost they were dealing. There was an immense amount of detail to check but gradually item by item the various points were dealt with and settlement was finally reached for the sum of \$26,106.37."

Then follow certain details of how this is made up. He concludes:

"You will remember that an estimate of \$22,500.00 was set up on our records in the initial stages. The assured gave us that figure originally, and we feel he was quite sincere, but it seems that he did not add up the variety of items very carefully and simply had the idea in his mind that the figure would be somewhere around that amount. As we say, it has taken months to bring all the various items into tabulation form, and, realizing the problems involved, we are not unduly criticizing him in this regard."

The proofs of loss are dated the 9th August 1944, and schedule "B" refers to a statement of loss lodged with Edwards & Angas Limited and approved by Regal Films Corporation (1941) Limited.

By letter of 30th August 1944 (ex. 3), Edwards & Angas Limited forwarded to the defendant the details that are referred to in schedule "B", and in that letter they state:

"Further to our report on the above claim, we now have pleasure in enclosing herewith complete details on which the final settlement was made."

Between 18th November 1943 and August 1944, when the proofs of loss were finally submitted, the adjusters made periodic reports to the defendant, and in each case sent a copy of these reports to Irish & Maulson Limited, the insurance brokers.

In ex. 5, the report of 18th November 1943, there is the following paragraph:

"In the meantime, as stated, we cannot give an estimate as to the loss coming under your policy and this report is merely to advise you of the occurrence. We, however, are checking immediately with the Officials of the Assured and hope within the course of the next short while to be in a position to give you reasonably accurate figures for estimate purposes."

Another report followed on the 24th November 1943; still another on the 26th November, and another on the 30th December 1943. In the report of the 24th November (ex. 6) it was suggested that for estimate purposes the loss should be put down at \$15,000. In the report of the 30th December (ex. 8) this figure was raised to \$22,500.

On the 10th March 1944 the adjusters, Edwards & Angas Limited, in a similar report, also sent to Irish & Maulson Limited and the defendants, stated with reference to the above matter:

"... we had anticipated that before this date a final settlement of claim would have been completed and our final report in your hands.

"There have been several delays experienced however in concluding this adjustment and the Assured have requested that the taking of the Proofs of Loss be deferred until such time as they are in a position to confirm the actual loss sustained.

"Their premises as a whole are still in such of a state of turmoil, due to the fact that the repairs to the building have not as yet been completed.

"Accordingly a proper tabulation of the claim has not been accomplished and the Assured are most anxious that they be given further time to check the various items and set up their statement of loss.

"We have agreed to this procedure and insofar as this particular loss is concerned, it is likely that a conclusion will not be possible for another month or six weeks."

There is no evidence that the defendants in any way dissented from the course taken by the adjusters in agreeing to this procedure, and the course of conduct followed would warrant, the conclusion, and I so conclude, that they concurred in it.

It is suggested that because this letter of 10th March was written after the 60-day period referred to in the policy, with which I shall deal presently, it should not be taken as evidencing an agreement in respect of this matter. I think it is useful to show that the course adopted by Mr. Pelton was adopted to the knowledge of the defendant, if that be of any real importance in this case, and that it, moreover, was acquiescing in this course.

Mr. Pelton said—and I may say there is no suggestion in this trial that Mr. Pelton is not giving a truthful and accurate account to the best of his ability of everything that took place—that at the beginning of the adjustment they were agreed that they should proceed by appraisalment and by getting repairs done. The course of conduct that was followed throughout is consistent with this arrangement and with no other.

Several defences are raised in the pleadings, but the only defence relied on at the trial is as set out in para. 8 of the statement of defence. The defendant contends that the contract of insurance, which is ex. 1, contains a condition that relieves it of liability. The relevant portions of the policy read as follows:

"This policy is made and accepted subject to the provisions, exclusions, conditions and warranties set forth herein or endorsed hereon, and upon acceptance of this policy the Assured agrees that its terms embody all agreements then existing between himself and this Company or any of its agents relating to the insurance described herein, and no officer, agent or other representative of this Company shall have power to waive any of the terms of this policy unless such waiver be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached. This policy shall be void in event of violation by the Assured of any agreement,

condition or warranty contained herein or in any rider now or hereafter attached hereto."

One of the conditions attaching to the policy, and the only relevant one, I think, in considering this aspect of the case, reads as follows:

"NOTICE AND PROOF OF LOSS

"The Assured shall report to the Company or to an Agent of the Company, every loss or damage which may become a claim under this policy, immediately such loss or damage comes to his knowledge. Within sixty (60) days after loss or damage the Assured shall make written statement to the Company, signed and sworn to by him stating the place, time and cause of loss or damage, the interest of the Assured and all others in the property, cost price of each article lost or damaged, from whom purchased or obtained, their value at time of loss, the amount of loss or damage claimed, the total amount of insurance carried on the property covered by this Policy, the total value of all property covered by this Policy on the date the loss occurred, and the value of the property in the specific location where the loss occurred. The Assured shall, if required, exhibit damaged property, submit to an examination under oath, and produce bills or certified copies thereof if originals be lost covering the property lost or damaged. Failure by the Assured either to report the said loss or damage or to file such complete proofs of loss as above provided, shall invalidate any claim under this policy."

The only point that was taken in respect of this provision, either in argument or throughout the trial, is that the proofs of loss were not filed within 60 days after the loss or damage occurred. It is contended that this is an absolute condition of liability and that, in view of the fact that the condition has not been fulfilled, there is no liability.

In answer to this, counsel for the plaintiff rely on the provisions of Part IV of The Insurance Act, R.S.O. 1937, c. 256, particularly s. 106 and statutory condition no. 15.

The provisions of s. 106 are:

"The conditions set forth in this section shall be deemed to be part of every contract in force in Ontario, except contracts where the subject matter of the insurance is exclusively rents, charges or loss of profits and shall be printed on every policy

with the heading 'Statutory Conditions' and subject to the provisions of section 110, no variation, omission or addition thereto shall be binding on the insured, nor shall anything contained in the description of the subject matter of the insurance be effective in so far as it is inconsistent with, varies, modifies or avoids any such condition."

Statutory condition no. 15 governs the matter of the requirements of proofs of loss. It reads:

"Any person entitled to claim under this policy shall:

"(a) forthwith after loss give notice in writing to the insurer;

"(b) deliver, as soon thereafter as practicable, a particular account of the loss",

and sets out certain details in respect to the form of the proof of loss.

The qualifications of s. 110 have, so far as I can see, no bearing on the issue between the parties.

If this policy of insurance comes under Part IV of The Insurance Act, there is no doubt in my mind that the condition of the policy in respect of the proofs of loss relied upon by the defendant is inconsistent with and varies or modifies statutory condition no. 15. Statutory condition no. 15 does not put any express time-limit on the insured within which he must submit proofs of loss. The only stipulation is that these shall be delivered as soon as practicable after the loss. It is a question of fact, for the Court to decide under the circumstances of each case, whether the proofs have been filed as soon as practicable after the loss.

On the facts of this case it is not contended, nor has it been argued, that the proofs of loss were not filed as soon as was practicable, having regard to the method of adjustment that was agreed to in respect to this loss.

One can easily see that it was to the advantage of the insurer that it should have the experience of the actual cost of replacement or repairs rather than have to settle, particularly in these times when costs are so indefinite, on an appraisal of the probable cost. Be this as it may, this was the course adopted with the concurrence of the insurer in the settlement of this loss, and there is no case made out to show that there was

any undue delay after it became practicable to make proof of the loss on the basis of adjustment that had been adopted.

As I said, counsel for the defendant has not argued this case on this basis. His argument is addressed to a very narrow point, and that is, that this policy does not come under Part IV of the Act, and that statutory condition no. 15 does not apply. It is therefore necessary to consider the policy in the light of this argument.

It is contended by counsel that this is marine insurance, and the policy is headed "Inland Marine Policy." On the other hand, it is argued on behalf of the plaintiff that the policy is a policy of fire insurance in so far as it applies to the loss here in question.

Under s. 101, which is contained in Part IV of the Act, it is provided that, unless the context otherwise provides " 'Contract' means a contract of insurance against loss of or damage to property in Ontario or in transit therefrom or thereto, caused by fire, lightning or explosion, and includes a policy, certificate, interim receipt, renewal receipt or writing evidencing the contract, whether sealed or not, and a binding oral agreement".

Section 1 of the Act, in subs. 23, defines "Fire insurance" to mean "insurance (not being insurance incidental to some other class of insurance defined by or under this Act) against loss of or damage to property through fire, lightning or explosion due to ignition".

"Marine insurance" is defined under subs. 39 as "insurance against marine losses; that is to say, the losses incident to marine adventure, and may by the express terms of a contract or by usage of trade extend so as to protect the insured against losses on inland waters or by land or air which are incidental to any sea voyage."

I fail to see anything in this policy that suggests the loss by fire insured against is a loss "incident to marine adventure". It is true that in clause 1 there are certain risks included other than the risk of fire and lightning, such as windstorm, cyclone, tornado, theft, robbery, burglary, hail, explosion, etc., but in none of these risks is there insurance that could be described as marine insurance.

As I read the policy, the insurance against the risk of fire and lightning is a primary risk and not a risk incidental to

any other risk insured against in the policy, and I do not think that within The Insurance Act an insurance company can include in one policy several risks, some of which come within Part IV and some of which do not come within Part IV, and then seek to escape the provisions of Part IV in respect of those primary risks that would come within Part IV.

The only case relied upon by counsel for the defendant in argument was *Staples v. Great American Insurance Company, New York*, [1941] S.C.R. 213, 8 I.L.R. 98, [1941] 2 D.L.R. 1. This case had to do with insurance on a motor launch, and it was dealt with entirely from the point of view that this was a marine risk coming within subs. 39 of s. 1. Mr. Justice Kerwin, at p. 218 (S.C.R.), says, "Loss by fire was a risk insured against but the mere reading of the policy demonstrates that this was insurance incidental to some other class of insurance; and subsection 39 of section 1 shows that it was incidental to a class of insurance defined by the Act, i.e., marine insurance."

Reading this policy as a whole, I cannot find that it is demonstrated that the risk of fire and lightning were risks incidental to marine insurance as defined by the Act, nor can I find on the argument presented by Mr. Amys that it was incidental to any other class of insurance that did not come within Part IV of the Act. It is a contract to insure against loss by fire and lightning, and that risk is not in any way incidental to some general insurance in respect of some other risk not coming within Part IV.

Finally, if it were necessary, and could be found to be necessary by reason of the fact that the plaintiff's right to relief should in any way be barred by imperfect compliance with any statutory condition as to the proofs of loss in this case, either in whole or in part, I am of the opinion that it would be inequitable that the insurance should be forfeited or avoided on that ground, having regard to all the facts of the case, and I would readily grant relief against forfeiture in so far as s. 109 of the Act gives me power.

I think I am putting it in very restrained language when I say that it would be most inequitable to allow this company to enter into a contract of this sort and accept premiums and through its adjusters agree to a scheme of adjustment that

would make proof of loss impossible until that scheme of adjustment had been carried out and then to avoid payment because they have agreed to a scheme of adjustment under which no proof of loss could possibly be made within 60 days.

Judgment will therefore go for the plaintiff for the amount claimed, namely, \$26,106.37, together with interest at 5 per cent. per annum from the 30th day of October 1944. I make it the 30th October giving the defendant the benefit of the doubt. Although the proofs of loss had been lodged with Edwards & Angas Limited at an earlier date, apparently the 9th August, the final schedule was not transmitted to the defendant until the 30th August. The plaintiff is entitled to its costs.

Judgment accordingly.

2nd April 1946. The appeal was heard by HENDERSON, HOPE and HOGG JJ.A.

J. H. Amys, for the defendant, appellant: The trial judge, in dealing with the motion for a non-suit, misdirected himself as to the cause of action set up in the statement of claim, and as to whether or not the plaintiff had adduced sufficient evidence to support that case, and to justify calling for a defence. An insurance company should not be in a different position from any other defendant. [HENDERSON J.A.: There is ample evidence that there was an insurance policy in full force and effect on the day the loss occurred.]

Proofs of loss were not filed within 60 days, as required by the contract, and this is a condition precedent to the bringing of an action, and cannot be waived by an adjuster: *The Atlas Assurance Company v. Brownell et al.* (1899), 29 S.C.R. 537; *The Commercial Union Assurance Company v. Margeson and Miller* (1899), 29 S.C.R. 601. There was no action on our part that caused the plaintiff to let the 60 days elapse without filing its proofs of loss. [HENDERSON J.A.: You did everything to induce these people to believe that their position was in no way jeopardized.]

Section 106 of The Insurance Act, R.S.O. 1937, c. 256, does not apply to this contract, which is not one of fire insurance: *Staples v. Great American Insurance Company, New York*, [1941] S.C.R. 213 at 219, 8 I.L.R. 98, [1941] 2 D.L.R. 1. It might be considered insurance against "property damage".

C. F. H. Carson, K.C. (J. G. Middleton with him), for the plaintiff, respondent: The policy sued on is one of fire insurance, within ss. 1(23), 101(2) and 102(1) of The Insurance Act, and there can be no doubt that the loss was caused primarily by fire. The *Staples* case, *supra*, is clearly distinguishable. This is clearly not insurance against "property damage", which is defined in s. 198 of the Act, as incidental to automobile insurance. [The Court intimated that it did not require to hear further argument.]

J. H. Amys, in reply.

At the conclusion of the argument, THE COURT delivered judgment orally, dismissing the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, respondent: Tilley, Carson, Morlock & McCrimmon, Toronto.

Solicitors for the defendant, appellant: Hughes, Agar, Thompson & Amys, Toronto.

[COURT OF APPEAL.]

Re Gemmill.

Trusts—Validity—Severability—Capacity of Trustee—Promotion of Humane Slaughtering of Animals—Municipality as Trustee—The Municipal Act, R.S.O. 1937, c. 266, s. 267—The Public Health Act, R.S.O. 1937, c. 299, s. 112.

Charities—Charitable Object—Humane Slaughtering of Animals—The Mortmain and Charitable Uses Act, R.S.O. 1937, c. 147, s. 1(2)(d).

A testatrix (resident in England) devised property to her Canadian trustees "upon trust for the Almonte, Ontario Town Council to be applied" (a) as to real property in Almonte, for the construction and maintenance of a public park, and (b) as to other real property in various parts of Ontario and in Manitoba "for the purpose of establishing on these properties a Slaughter House or Slaughter Houses in which there shall be carried out the humane slaughtering of animals and with the object of carrying on and promoting and furthering in Canada the work of" an English Association for the promotion of humane methods of slaughter, and as to her personal estate "to be used for the purpose of promoting and furthering in Canada the work of the said Association". By a later clause (7) she provided that should these trusts fail the Canadian estate should be transferred to her English trustees "upon trust for the . . . Association absolutely for the purposes of the Association".

Held, (1) the words "the Almonte, Ontario Town Council" should be interpreted as meaning the Corporation of the Town of Almonte; (2) both the trusts set out above were charitable trusts, and that set out as (a) was valid and effectual, standing alone, but that set out as (b) failed for lack of capacity in the municipality (whose

powers were limited to its own territory and that of adjoining municipalities) to accept it; (3) the trusts were not interdependent, or contingent one upon the other, but were severable. That set out as (a) should accordingly be performed, but the property designated in (b) should be transferred to the English trustees in accordance with clause 7.

Judgment of Greene J., [1945] O.R. 642, varied.

AN APPEAL by the Town of Almonte from the order of Greene J., [1945] O.R. 642, [1946] 1 D.L.R. 480, upon a motion for the determination of questions arising under the will of Winnifred Knight Gemmill, deceased.

8th February 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

G. W. Mason, K.C., for the Town of Almonte, appellant: The trust created by para. 6(a) of the will is a valid charitable trust, and can be separated from that contained in para. 6(b). Municipalities are authorized by statute to accept lands for park purposes, and such a trust is expressly recognized by s. 8(2) of The Mortmain and Charitable Uses Act, R.S.O. 1937, c. 147. Assuming that the judge of first instance was right in holding that the trust in para. 6(b) was invalid, para. 6(a) is not so connected with it as to be invalid. Where a fund is to be divided between valid and invalid objects, in such a way that neither part of the gift is contingent or dependent upon the other, the Court will uphold the valid part: *In re Barker; Sherrington v. Dean and Chapter of St. Paul's Cathedral et al.* (1909), 25 T.L.R. 753.

As to severability, I refer to *Brooks-Bidlake and Whittall, Limited v. Attorney-General for British Columbia et al.*, [1923] A.C. 450 at 454, [1923] 2 D.L.R. 189, [1923] 1 W.W.R. 1150; *Loeb v. Columbia Township Trustees* (1900), 179 U.S. 472 at 490; *Toronto Corporation v. York Corporation*, [1938] A.C. 415, [1938] 1 All E.R. 601, [1938] 1 D.L.R. 593, [1938] 1 W.W.R. 452.

As to para. 7, all of the trusts in favour of the Town of Almonte do not fail. The language of the paragraph should not be construed as meaning that all the trusts must stand or fall together. Para. 7 operates only to the extent that the trusts, or parts of them, fail.

Alastair Macdonald, for the next-of-kin: The trust created by para. 6(a) is valid under s. 8(2)(a) of The Mortmain and Charitable Uses Act, and s. 404(46) of The Municipal Act, R.S.O. 1937, c. 266, but that under s. 6(b) fails because the municipality

has no power to carry it out, under s. 113(1) of The Public Health Act, R.S.O. 1937, c. 299. The scheme is neither practicable nor charitable: *In re Grove-Grady; Plowden v. Lawrence*, [1929] 1 Ch. 557 at 571. The two paragraphs, however, are severable.

The *cy-près* doctrine does not apply unless the Court finds a general charitable intention: 12 C.E.D. (Ont.), p. 318. The trust in par. 6(b) fails entirely, but para. 7 does not apply because only one trust has failed, and not "the trusts": *Re Wolff*, [1943] O.W.N. 470. There is therefore an intestacy as to the property dealt with in para. 6(b).

L. A. Kelley, K.C., for the Council of Justice to Animals and Humane Slaughter Association: Both para. 6(a) and para. 6(b) create valid charitable trusts. A trust for the benefit of animals is charitable: Theobald on Wills, 8th ed. 1927, p. 392; *In re Douglas; Obert v. Barrow* (1887), 35 Ch. D. 472; cf. *The Commissioners for Special Purposes of The Income Tax v. Pemsell*, [1891] A.C. 531.

Although the trust under clause 6(b) is a good charitable trust, the municipality cannot accept it because the testatrix intended and directed that slaughter-houses should be established in parts of Canada neither within the municipality nor adjoining it, and directed further that the personalty should be used in promoting and furthering the work of the Association throughout Canada. The jurisdiction and powers of the municipality are limited by s. 267 of The Municipal Act, and cannot extend to such activities as these. Any attempt by a municipality to extend its powers will be firmly repressed: *Merritt v. City of Toronto* (1895), 22 O.A.R. 205 at 207.

The trusts under the two clauses of para. 6 are not severable. The word "trusts" in para. 7 must be given its true meaning. Para. 6 gives to the Canadian trustees all the testatrix's Canadian estate, and para. 7 refers to "my said Canadian Estate", which must relate back to para. 6. If the trust in para. 6(a) is upheld, the Canadian trustees will be unable to carry out the directions of para. 7 by transferring all the Canadian estate to the English trustees. Para. 6(a) should therefore also be held to fail, and the Canadian trustees should be directed, as was done by the judge of first instance, to convert the Canadian assets and turn over

the proceeds to the English trustees. This is necessary to give full effect to para. 1 of the will.

A. C. Hill, K.C., for the Canadian trustees, submitted his rights to the Court.

G. W. Mason, K.C., in reply, referred to 34 Halsbury, 2nd ed. 1940, p. 125, s. 159, and *Warren v. Rudall; Ex parte Godfrey* (1860), 29 L.J. Ch. 543.

Cur. adv. vult.

3rd April 1946. The judgment of the Court was delivered by

ROACH J.A.:—The late Winnifred Knight Gemmill, who, at the date of her death, was resident in the county of London, England, but who earlier resided in the town of Almonte, in Ontario, died in England in October 1943, leaving a will, certain provisions of which have given rise to these proceedings. The scheme of the will is as follows:—

By para. 1 she appoints certain persons resident in England as her “English Trustees” to administer her estate wherever situate, except in the Dominion of Canada, and to receive and deal with “the income and proceeds of sale of all real and personal estate devised and bequeathed” to her “Canadian Trustees” which the latter may have to hand over to them pursuant to certain directions later set out in the will.

By para. 2 she appoints certain persons resident in Canada her “Canadian Trustees”.

By para. 3 she bequeaths certain pecuniary legacies to persons therein named, and bequeaths to The Council of Justice to Animals and Humane Slaughter Association of London, England, hereinafter referred to as “the Association”, the sum of one hundred pounds.

By para. 4 she bequeaths all her personal chattels, within the meaning of s. 55(1) (x) of the English Administration of Estates Act, 1925, to her “English Trustees” for distribution in the manner therein directed.

By para. 5 she devises all her real estate, and bequeaths the residue of her personal estate (other than her real and personal estate devised and bequeathed to her “Canadian Trustees”) to her “English Trustees” to sell, call in and convert the same into money, and, after payment of her debts, funeral and testamentary expenses, legacies and succession duties payable on such

legacies, to pay or transfer the same to her "Canadian Trustees" to be held by the latter upon certain trusts later set forth in the will.

Para. 6 is as follows:—

"I DEVISE AND BEQUEATH all my real and personal estate situate and being within the jurisdiction of the Canadian Courts and all debts and choses in action recoverable or enforceable in such Courts and also the residue of my English estate as aforesaid to my CANADIAN TRUSTEES UPON TRUST for the ALMONTE, ONTARIO TOWN COUNCIL to be applied by the said Town Council in the following manner:

"(a) AS to my Freehold property in Almonte consisting of a house and lands commonly known as the Homestead Property consisting of ninety-eight acres or thereabouts being part of Lot 15 in the Ninth Concession of the Township of Ramsay Ontario now within the limits of the Town of Almonte to construct establish and maintain a Public Park or Recreation Ground.

"(b) AS to Two hundred acres in the Township of Huntley (near Almonte) described as West Half of Lot Nine in the Ninth Concession and East Half of Lot Nine in the Tenth Concession and as to the One hundred and sixty acres (half section) situated in the Township of Sharpe, District of Temiskaming No. Ontario, being South half of Lot Nine in the Third Concession of the Township of Sharpe AND AS TO the East part of Lot Twenty-one Concession Eleven in the Township of Ramsay County of Lanark Ontario and as to my interest in the land consisting of approximately One hundred and sixty acres near Winnipeg in the Province of Manitoba and which was sold for me about three years ago by the Toronto General Trusts Corporation of Winnipeg but which has not yet been fully paid for by the purchaser for the purpose of establishing on these properties a Slaughter House or Slaughter Houses in which there shall be carried out the humane slaughtering of animals and with the object of carrying on and promoting and furthering in Canada the work of the Council of Justice to Animals and Humane Slaughter Association of London, England and as to my personal estate as aforesaid to be used for the purpose of promoting and furthering in Canada the work of the said Association."

Para. 7 is as follows:—

"I DECLARE that should the Trusts in favour of the Almonte Town Council fail for any reason whatsoever whether on legal grounds or otherwise my said Canadian Estate and the residue of my English Estate shall be transferred by my Canadian Trustees to my English Trustees UPON TRUST for the COUNCIL OF JUSTICE TO ANIMALS AND HUMANE SLAUGHTERING ASSOCIATION of London England absolutely for the purposes of the Association and I DESIRE that in that event the said Association shall do its utmost to further its cause in the Dominion of Canada."

Under Rule 600 the Canadian Trustees applied to the Court for its advice and direction in respect of the following:

"(1) Should the words 'Almonte Ontario Town Council' wherever used in the said will be properly construed as being intended by the testatrix to mean 'The Corporation of the Town of Almonte' in the Province of Ontario, and, if so, is such Corporation a cestui que trust under the terms of the said will?

"(2) Are the trusts, or any of them, as set out in paragraph 6 of the will, charitable trusts, and if so, which?

"(3) Are the trusts or any of them created by paragraph 6 of the will for the Almonte Ontario Town Council or the Corporation of the Town of Almonte valid and effectual trusts, and if so, which?

"(4) Are the trusts severable? And if so, which?

"(5) If severable, is the said Town Council or the Corporation of the Town of Almonte entitled to the personal estate or any portion thereof for any of the purposes mentioned in the will, and if so, what purpose?

"(6) If the trusts, or any of them, are valid and severable who should, under the terms of the said will, administer the personal estate referred to in paragraph 6(b) of the will?

"(7) Under the terms of the said will, properly construed, are the 'Canadian Trustees' under a duty to convey or transfer any portion or portions of the real property of the testatrix in Canada to either the Almonte Town Council for the time being or to the Corporation of the Town of Almonte, and if so are the said 'Canadian Trustees' under a duty to concurrently secure from either the said Almonte Town Council or the said the Corporation of the Town of Almonte security adequate in the

opinion of the said 'Canadian Trustees' that such real property will at all times in the future be used and maintained by either thereof for the purposes by the said testatrix declared in her said will and not otherwise?

"(8) If either the 'Almonte Town Council' or 'The Corporation of the Town of Almonte' for any reason refuses to accept a transfer or a conveyance of any of the real property in the will of the testatrix referred to in clause 6 thereof or to enter into an agreement or undertaking satisfactory to the 'Canadian Trustees' that the lands will at all times be used for the purposes in the said will mentioned, what disposition thereof is it the duty of said 'Canadian Trustees' to make?

"(9) Have any of the trusts referred to in paragraph 7 of the will failed and, if so, which and does the failure of any one trust result in the determination of the remaining trusts referred to in the said will?

"(10) If any of the trusts referred to in paragraph 7 of said will have failed, and if the Council of Justice to Animals and Humane Slaughter Association, is either unwilling or unable to further its cause in Canada, has any intestacy resulted, and if so in respect of what portion or portions of the estate of the testatrix?

"(11) If no intestacy has resulted and said trusts, or any of them, are charitable but incapable of being effectuated in accordance with the expressed terms of the will of the testatrix, then to what charitable purposes and in what manner ought the 'Canadian Trustees' to apply the estate of the testatrix, and that the Court may direct accordingly."

The motion was heard by the late Mr. Justice Greene, who held as follows:—

Question 1—The words "Almonte Ontario Town Council" wherever used in the will mean "The Corporation of the Town of Almonte" in the Province of Ontario.

Question 2—The trusts set out in sub-paragraphs (a) and (b) of paragraph 6 are charitable trusts.

Question 3—The trust created by 6(a) is a valid and effectual trust, but the trusts created by 6(b) are invalid.

Question 4—The trusts created by 6(a) and 6(b) are not severable, and both fail.

Having answered question 4 as above, it was unnecessary to answer questions 5, 6, 7 and 8.

As to questions 9, 10 and 11, Mr. Justice Greene held that the residue of the Canadian estate, and the residue of the English estate should be transferred by the Canadian Trustees to the English Trustees for the Council of Justice to Animals and Humane Slaughter Association, and that there was a power of sale given to the Canadian Trustees which it was their duty to exercise for the purpose of transferring the proceeds of sale to the English Trustees.

From that judgment the Town of Almonte now appeals.

On the argument of this appeal counsel for the appellant argued, and counsel for the respondents, other than the trustees who simply submitted their rights to the Court, conceded, that the trust created by 6(a) was a charitable trust and could be accepted by the Town of Almonte unless it failed on account of its not being severable from 6(b).

For the municipality it was further argued that the trust created by 6(a) was severable from the trusts created by 6(b). Counsel for the next-of-kin adopted that argument. Counsel for the Association contended that those trusts were not severable.

From that point forward the positions taken by the parties were as follows:

The municipality: It was indifferent on the question whether the trusts in 6(b) fail or not; that the trust created by 6(a) being valid and severable from 6(b), para. 7 applies only to the property covered by 6(b).

The next-of-kin: The trusts created by 6(b) fail; they are not charitable trusts and there is a resulting intestacy in favour of the next-of-kin.

The Association: The trusts created by 6(b) are charitable trusts, but fail, and since they are not severable from the trust in 6(a), all trusts fail; there is not a resulting intestacy; para. 7 operates so that all the property included in both trusts goes to that Association.

I deal first with the question, are the trusts contained in para. 6(b) charitable trusts? The Association is evidently a subsisting body in England, and, according to its constitution, has as its objects: "(1) the promotion of humane methods of

slaughter, (2) the introduction of reforms in cattle markets where needed (including transport facilities), (3) the substitution of public abattoirs for private slaughter-houses”.

The Mortmain and Charitable Uses Act, R.S.O. 1937, c. 147, provides by s. 1(2) that:

“The following shall be deemed to be charitable uses within the meaning of this Act,—

“(a) the relief of poverty;

“(b) education;

“(c) the advancement of religion; and

“(d) any purpose beneficial to the community, not falling under the foregoing heads.”

I am not in any doubt that this is a valid charitable trust as coming within s. 1(2)(d) of the statute: reference to *In re Wedgwood; Allen v. Wedgwood*, [1915] 1 Ch. 113.

Notwithstanding that it is a valid trust, it fails because of lack of capacity or jurisdiction in the municipality to accept it. It is, of course, axiomatic that a trust never fails for lack of a trustee, but here the testatrix, apparently contemplating the possible difficulty which is now an actuality, by para. 7 has provided for that contingency by substituting a new trust in lieu of this one. There is here no room for the application of the *cy-près* doctrine.

The municipality has only such jurisdiction as is conferred upon it by statute. It has power under The Public Health Act, R.S.O. 1937, c. 299, s. 113, to establish a slaughter house either within the municipality or in an adjoining municipality, but it is clear that so to do would not carry out the full intention of the deceased. The purpose of the trusts expressed in para. 6(b) is to promote the objects of the Association, not only in the town of Almonte or in municipalities adjacent thereto, but also in fields within the Dominion of Canada beyond the locus of that town, or municipalities contiguous thereto. Section 267 of The Municipal Act, R.S.O. 1937, c. 266, provides that: “Except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law.”

The next question for determination is, are the trusts under para. 6(b) severable from the trust under para. 6(a)?

In Halsbury's Laws of England, 2nd ed., vol. 33 (1939), p. 112, s. 198, the law is stated as follows:

"If the trust is expressly for certain objects and purposes, some legal and some illegal, the question whether the trust is wholly valid or wholly void, or is partly valid and partly void, depends upon the particular form of the trust. If the portion of the property which would have to be applied to the illegal purpose, supposing it to have been legal, has been prescribed or can be ascertained, the trust, so far as relates to the legal purpose, will be upheld [citing *Champney v. Davy* (1879), 11 Ch. D. 949, and *In re Vaughan*; *Vaughan v. Thomas* (1886), 33 Ch. D. 187]."

In Corpus Juris, vol. 65 (1933), p. 333, s. 96, it is put thus:

"It is well settled that the invalidity of some of the objects or provisions of a trust, or of part of several trusts created by the same instrument, will not affect the validity of remaining objects, provisions, or trusts which are separate and independent but in such case the invalid portions will be rejected and the valid portions permitted to stand [citing, *inter alia*, *McIsaac v. Heneberry* (1878), 20 Gr. 348, and *Goodeve v. Mannors* (1855), 5 Gr. 114]. The rule is otherwise where the valid and invalid parts are so blended and intertwined in one scheme that one is not enforceable, according to the intent of the creator of the trust, without the other."

The rationality of the law as thus stated justifies a like rule for application to the case of two or more trusts created by the same instrument, one of which is valid and effectual, and the others of which, though not invalid, fail for any other reason.

It is beyond argument that the trust created by para. 6(a) is valid and effectual unless made invalid or ineffectual by something contained elsewhere in the will. It is equally certain that the trusts contained in para. 6(b) fail and that the property covered thereby is made the subject of another trust by para. 7.

It was argued by counsel for the Association that, as a result of the provisions of para. 7 of the will, if either or both the trusts in para 6(a) and 6(b) fail then the Canadian Trustees are required to transfer to the English Trustees the whole Canadian estate and the residue of the English estate. In support of that argument he referred to the plurality of the word "Trusts" and the words "my said Canadian Estate" as they are found in

para. 7 and urged that the trusts in paras. 6(a) and 6(b) either stand or fall together. In the beginning of our process of reasoning to determine the question of severability, we do not at once look at para. 7. We begin by looking at the paragraphs which create the trusts, and determine whether or not, by reference to those paragraphs, one trust is made contingent on the other, or whether or not they are blended and intertwined so that according to the intent of the creator of the trusts one is not enforceable without the other. There is nothing in para. 6(a) or (b) that suggests that the trusts thereby created are in any way related to one another; they are distinct and separate and not in any way contingent on or residuary to one another. One may stand even though the other fails. Those in 6(b) fail but that in 6(a) stands. We then turn to para. 7 to get the result. The trusts (plural) in favour of the municipality have not failed; one only has failed and accordingly, on a much too narrow and constrained interpretation of that paragraph, it might be argued that the condition on which anything is to be transferred to the English Trustees had not arisen and therefore that nothing should be so transferred. To give effect to that argument would do violence to the paragraph and frustrate the wishes of the testatrix as therein demonstrated. That paragraph, in my firm opinion, only operates to the extent that the trusts in either para. 6(a) or (b) fail and does not mean that the trusts in those respective paragraphs must stand or fall together.

Whether or not the latter part of para. 7 creates a precatory trust, in my opinion, should not be decided by this Court. If the question arises it is essentially one to be determined by the Courts in England where the trust is to be administered, and which Courts would have jurisdiction over the English Trustees.

Para. 1 of the will clearly indicates that, in the circumstances, the Canadian Trustees have power to convert into money so much of the property described in para. 6(b) as does not consist of money, and para. 7 requires them to transfer the same, together with any other moneys in their hands, to the English Trustees.

In the result the appeal should be allowed, and the judgment below amended, and, as amended, will adjudge and declare as follows:—

1. The words "Almonte Ontario Town Council" wherever used in the will of the deceased mean "The Corporation of the Town of Almonte" in the Province of Ontario.

2. The trusts set out in para. 6 are charitable trusts.

3. (a) The trust created by para. 6(a) of the will is a valid and effectual trust; (b) the trusts created by para. 6(b) fail.

4. The trust created by para. 6(a) and those created by para. 6(b) are severable.

5. The Corporation of the Town of Almonte is not entitled to the personal estate, or any part thereof.

6. The Canadian Trustees shall convert into money so much of the property, real and personal, described in para. 6(b), as does not consist of money, and transfer the proceeds from such conversion, together with all other moneys in their hands, less the costs of administration in Ontario, and less the costs of these proceedings, to the English Trustees.

7. The Canadian Trustees are under duty to convey the freehold property in Almonte described in para. 6(a) of the will to the Corporation of the Town of Almonte in trust to construct, establish and maintain a public park or recreation ground, provided the said corporation will accept a conveyance of the said property on this trust.

The Canadian Trustees are not, in the language of the question submitted, "under a duty to concurrently secure from" the municipal corporation security that the said freehold property will, at all times in the future, be used and maintained for the purposes declared by the testatrix in her will. If the municipal corporation accepts the said freehold property upon the said trusts, it holds the same subject thereto, and cannot without statutory authority alienate it for another public purpose, and any attempt will be restrained by injunction: see *Attorney-General v. Goderich* (1856), 5 Gr. 402, and *The City of Hamilton v. Morrison* (1868), 18 U.C.C.P. 228.

8. If the Corporation of the Town of Almonte should refuse to accept the property described in para. 6(a) upon the trusts set forth in the answer to question 7, then the Canadian Trustees shall convert the same into money and transfer the proceeds of such conversion, less their proper costs, to the English Trustees.

The costs of all parties in these proceedings, including the costs in the court below, and of this appeal, should be paid out

of the property described in para. 6(b) of the will, those of the Trustees on a solicitor and client basis.

Appeal allowed in part.

Solicitor for the Town of Almonte, appellant: R. A. Jamieson, Almonte.

Solicitors for the Council of Justice and Humane Slaughter Association: Ewart, Scott, Kelley, Scott & Howard, Ottawa.

Solicitors for the next-of-kin: Clark, Robertson, Macdonald & Connally, Ottawa.

Solicitors for the executors and trustees: Hill & Hill, Ottawa.

[COURT OF APPEAL.]

Brown v. Rotenberg et al.

Gifts—Donatio Mortis Causa—Sufficiency of Delivery—Key to Safety-Deposit Box—Pass-Book for Account in Provincial Savings Office—The Agricultural Development Finance Act, R.S.O. 1937, c. 77.

Delivery of a pass-book for an account in the Province of Ontario Savings Office held not to constitute a valid *donatio mortis causa* of the moneys on deposit in the account, since the terms and conditions governing the account were not set out in the pass-book, and it was not shown to be a necessary link in the obtaining of the money by the donee. *Delgoffe v. Fader*, [1939] Ch. 922, and other authorities, considered.

Delivery of a key for a safety-deposit box constitutes a valid and effectual *donatio mortis causa* of the contents of the box (in so far as those contents may be made the subject of such a gift), since by that delivery the donor has parted with the only means he possesses of getting at the contents, and thus with dominion and control over the contents, and the donee is in a position to demand that the donor's personal representatives complete the title by furnishing whatever authority or facilities are necessary for the taking of complete possession.

AN APPEAL by the defendants from the judgment of Barlow J., [1945] O.W.N. 844, [1946] 1 D.L.R. 135.

21st February 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and HOGG JJ.A.

J. R. Cartwright, K.C., for the defendants Sydnor and Kurtz, appellants: This was not the case of a man *in extremis*. The deceased had ample opportunity to change his will, and in fact had already made two wills. The gift now alleged was made on 9th May, and Brown did not die until 29th May, while it was not until the will was read, a month later, that either the plaintiff or her daughter mentioned the facts now relied upon as constituting a gift. In cases of this kind, it is a well-recognized principle

that the Court should examine all the surrounding circumstances with the closest scrutiny and even suspicion. The daughter's evidence should not have been accepted as furnishing the necessary corroboration of the plaintiff's story, because she was not a disinterested witness: *Wilton v. Hays* (1843), 1 L.T.O.S. 263. Further, she contradicted the plaintiff in two material points.

The plaintiff's delay in mentioning this alleged gift is a most curious factor, and one that the Court should carefully consider: *In re Whittaker*; *Whittaker v. Whittaker* (1882), 21 Ch. D. 657 at 665. [LAIDLAW J.A.: Surely that circumstance is significant only if there was some duty on the plaintiff to disclose the facts.] [ROBERTSON C.J.O.: She may have thought that the will would contain all that the deceased had previously said to her.]

There would be no impropriety in the daughter discussing the alleged gift with her mother, but the importance of the fact is that the trial judge accepted the statement that there was no such discussion, which seems most improbable in the light of experience. I refer to *In re The Saskatchewan Insurance Act*; *In re Shawaga Estate*, [1944] 2 W.W.R. 402, [1944] 4 D.L.R. 410, 11 I.L.R. 256; *McGonnell v. Murray* (1869), 3 I.R. Eq. 460.

There was not sufficient evidence to show that the gift was made in contemplation of death, and in view of this and the other circumstances already referred to the trial judge should have held that the plaintiff had not discharged the onus which was upon her.

The words used were not effective words of gift, and there was no adequate delivery of the subject matter of the alleged gift: *Hall v. Hall* (1891), 20 O.R. 684 at 686, 692; *Young v. Derenzy* (1879), 26 Gr. 509; *Ward v. Turner* (1752), 2 Ves. Sen. 431, 28 E.R. 275; *Cosnahan v. Grice* (1862), 15 Moo. P.C. 215, 15 E.R. 476.

The moneys on deposit in the Provincial Savings Office could not pass by way of *donatio mortis causa* by mere delivery of the pass-book, since the pass-book did not contain the whole contract between the depositor and the bank, and surrender of the book was not essential for the withdrawal of money: *In re Reid* (1903), 6 O.L.R. 421; *Ex parte Gerow* (1863), 10 N.B.R. 512.

The delivery of the key to the safety-deposit box did not give complete dominion to the alleged donee over the contents of the box, and was therefore not a valid *donatio mortis causa*. Brown,

who was perfectly capable of making a will, is said to have handed over a bunch of keys and said, "Everything belongs to you." The key did not give control over the box, or, in itself, even a right of access to it. No one can have access to a safety-deposit box except the lessee of the box, his duly appointed attorney, or, after his death, his personal representative. There is no reported case where the mere delivery of such a key has been held to be sufficient. *In re Wasserberg; Union of London and Smith's Bank, Limited v. Wasserberg*, [1915] 1 Ch. 195, is distinguishable, in that there was specific identification of the property in question. *Simpkins v. Old Colony Trust Co.* (1926), 151 N.E. 87 at 90, is not applicable here. This alleged gift fails for two reasons: there were no specific words showing an intention to give the contents of the box, and the key did not carry with it the power to open the box.

The Court should not extend the class of things which can properly be made the subject matter of a *donatio mortis causa* to include items that have not previously been held to be capable of passing by such a gift: *Cusack v. Day*, 36 B.C.R. 106, [1925] 2 W.W.R. 715, [1925] 3 D.L.R. 1028; *Duckworth v. Lee*, [1899] 1 I.R. 405 at 407.

J. Shirley Denison, K.C. (J. M. Bennett with him), for the plaintiff, respondent: There is overwhelming evidence showing that the deceased was in apprehension of death, and the fact is clearly shown in the words of gift. The evidence is all to the effect that he made this gift in contemplation of death and that had he recovered he would have resumed possession and control of the property.

As to the pass-book, we refer to *In re Weston; Bartholomew v. Menzies*, [1902] 1 Ch. 680; *Darlow v. Sparks*, [1938] 2 All E.R. 235. *In re Weston* was discussed in *Delgoffe v. Fader* [1939] Ch. 922. Our case is much stronger on the merits than *Kendrick v. Dominion Bank and Bownas* (1920), 48 O.L.R. 539, 58 D.L.R. 309, where it was held that there was a valid *donatio mortis causa*.

Hall v. Hall (1891), 20 O.R. 684, recognizes the general principle of law as to the delivery of a key, but on the peculiar facts of that case it was held that the delivery did not carry with it the contents. So long as an effectual delivery of the key is proved,

it is immaterial how many different things go with it: *Duffield v. Elwes* (1827), 1 Bli. N.S. 497, 4 E.R. 959.

We rely greatly upon *In re Wasserberg; Union of London and Smith's Bank, Limited v. Wasserberg*, [1915] 1 Ch. 195.

H. M. Sherman, for the executor, defendant: The executor wishes only to distribute the property to the persons entitled.

J. R. Cartwright, K.C., in reply: The deceased said that he had provided for the plaintiff in his lifetime. This case is distinguishable on its facts from *In re Wasserberg, supra*, in that here neither the plaintiff nor her daughter says that any specific reference was made to the contents of the safety-deposit box. [LAIDLAW J.A.: Is there any significance to be attached to the fact that the plaintiff had an intimate knowledge of the deceased's property, and knew the contents of the safety-deposit box?] [HOGG J.A.: Do you say that unless there are express words of gift, the delivery of a key is insufficient?] Yes, there cannot be physical delivery of a chose in action.

Cur. adv. vult.

3rd April 1946. ROBERTSON C.J.O.:—The trial judge accepted the evidence of the respondent and of her daughter, in support of the claim of a *donatio mortis causa*. While opinions might differ as to the acceptance of that evidence, I am unable to see any ground upon which the Court of Appeal can say that the trial judge was wrong in accepting it. The appeal must, therefore, be determined upon the basis that that evidence is accepted.

Upon the question whether the evidence that the trial judge accepted establishes a valid *donatio mortis causa* of all that the learned trial judge held to have been validly given, I see no reason to disagree with his conclusion upon any item, except the money on deposit in the Province of Ontario Savings Office.

It is important to bear in mind that the Provincial Savings Office is not a bank. It is established under The Agricultural Development Finance Act, R.S.O. 1937, c. 77, which empowers the Treasurer of Ontario to borrow money by means of deposits, and to open offices for this purpose at such points in the Province of Ontario as he may find necessary. The statute further provides that, subject to the approval of the Lieutenant-Governor in Council, the Treasurer of Ontario may, from time to time, fix the conditions as to interest and repayments which shall

govern such deposits. These are matters of some importance in considering the significance of the delivery to the respondent of the pass-book for this savings account.

Many of the cases where the question whether the delivery of a pass-book has amounted to a good *donatio mortis causa* has arisen were discussed by Luxmoore L.J. in *Delgoffe v. Fader*, [1939] Ch. 922. It would appear to be established by the cases that for the delivery of a pass-book to amount to a good *donatio mortis causa* of the money to the credit of the donor in the account to which the pass-book relates, it must be shown that the pass-book contains the terms of the contract on which the money is held, and the pass-book must be a necessary link in the obtaining by the donee of the money in the account.

In my opinion the pass-book in question does not answer to either of these requirements. It does not state upon what terms or conditions, or at what times, the depositor may obtain repayment of the money borrowed in pursuance of the statute. The Provincial Treasurer may, from time to time, fix the conditions as to both interest and repayments which shall govern the deposits made in the account. Neither is there any regulation or condition, either in the statute or in the pass-book, or in any regulations that appear in evidence, requiring the presentation or delivery up of the pass-book, for the withdrawal of money on deposit. I do not think that the regulation that requires that when an account is closed the pass-book must be given up to the branch where the account is carried, forbids the withdrawal of money without presenting the pass-book. The closing of the account with which the regulation is concerned is not a necessary incident of the withdrawal of even all the money to the credit of the account. There would be nothing to prevent a depositor who had, on one day, withdrawn the whole of his credit balance, making a deposit on the next day to the credit of the same account. I am, therefore, in agreement with the opinion of my brother Laidlaw that the appeal should be allowed in so far as the judgment appealed from has held that there was a good *donatio mortis causa* of the moneys in the Provincial Savings Office, and that the judgment should be varied accordingly. Otherwise the appeal should be dismissed, and there should be no costs of this appeal to either party.

LAIDLAW J.A.:—The appellants are the daughters of the late Davis Brown, and are defendants in an action brought by their step-mother against them and Saul Rotenberg, executor of the last will and testament of her deceased husband. The respondent claimed in the action a declaration that she is the sole and absolute owner of certain property given by her husband to her as a *donatio mortis causa*, and an accounting by the defendant Saul Rotenberg of all moneys received by him from or in connection with such property. Judgment was pronounced by Barlow J. on the 2nd November 1945, whereby it was ordered and adjudged that the respondent is the owner of the money on deposit in the Province of Ontario Savings Office, Bay and Adelaide Streets Branch, Toronto, being account number B-1693, in the name of Davis Brown; that certain mortgages be vested in the respondent for all the estate, right, title and interest therein of the said Davis Brown prior to his decease; that the respondent is the owner of currency amounting to the sum of \$1,000 found in a certain safety-deposit box rented by the said Davis Brown prior to his decease; and that, after the taking of accounts by the Master of the Court as directed, and on confirmation of his report, the defendant Saul Rotenberg pay to the respondent any moneys found in his hands belonging to the respondent.

The question to be decided is whether the late Davis Brown made a valid *donatio mortis causa* (1) of the money on deposit in his name in the branch of the Province of Ontario Savings Office, and (2) of certain mortgages and currency in a certain safety-deposit box.

It has been said that “for an effectual *donatio mortis causa* three things must combine: first, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and thirdly, the gift must be made under such circumstances as shew that the thing is to revert to the donor in case he should recover”: *per* Lord Russell of Killowen C.J. in *Cain v. Moon*, [1896] 2 Q.B. 283 at 286, quoted by Lord Tomlin in *Wilkes v. Allington*, [1931] 2 Ch. 104 at 109, and paraphrased by Luxmoore L.J. in *Delgoffe v. Fader*, [1939] Ch. 922 at 927.

I examine the evidence accepted by the learned trial judge to determine whether all of the essential elements for a valid

donatio mortis causa are present in this case. The respondent married the late Davis Brown by Jewish rites in the year 1925 and lived with him as his wife from that time until his death on 29th May 1944. She had one daughter, Mrs. Usprech, by a former marriage. The learned judge accepted the evidence of the respondent and of Mrs. Usprech, and expressly refused to accept the testimony of the appellants. Counsel for the appellants endeavoured to show that the evidence given by Mrs. Usprech differed in many respects from the evidence given by the respondent, but I do not find that there is any substantial difference or contradiction in the evidence given by these two witnesses.

The deceased was between 72 and 73 years of age at the time of his death. During the winter of 1943-44 he was suffering from a duodenal ulcer. In the spring of 1944 he had a prostatic condition which required surgical relief. His doctor testified that the deceased was very much worried about himself and about the fact that the proposed operation would be very serious. He put off going to the hospital as long as he could, but he was compelled to do so on 9th May 1944. On the morning of that day he was undoubtedly quite ill, and in a weakened condition. He required assistance to dress and by way of nursing attention. He was emotionally upset, and was apprehensive of the outcome of the operation. Before leaving his home for the hospital, he said to the respondent, "Here's the bank book, here's the keys and everything belong to you; to who shall I give it if not to you." He also said, according to the testimony of the respondent, "Here's cheques from the mortgages; you shall collect the rent, you should not ask anybody for money and you go on the way I went on"; also, "if anything happens to me you should not get married." The respondent was asked, "How did that come out?" and she replied, "I don't know. He cried so much, he say to me, 'If I die you should not get married'." The evidence of Mrs. Usprech is that she and her mother and the late Mr. Davis Brown were all crying and that her mother said to him, "Don't do that, you will be out again and everything will be as usual." Amongst other things Mrs. Usprech testified also that the late Mr. Brown said to the respondent, "If anything should happen to me, don't get married."

If one accepts the evidence that under such circumstances the late Mr. Davis Brown made the statements to his wife, "If anything happens to me you should not get married", or "If I die you should not get married", and "You go on the way I went on", it is difficult, if not impossible, to escape the conclusion that he then contemplated death. It may be, as emphasized by counsel for the appellants, that four days before the deceased left his home to go to the hospital he indicated to Mrs. Kurtz, one of the appellants, that he was in a healthy mental and physical condition, and that two days before going to the hospital his talk with Mrs. Sydner did not indicate any contemplation of death. Nevertheless, I have no hesitation in finding that at the time of the conversation between the donor and his wife on 9th May he thought that he might not recover from his illness and the operation he was to undergo, and that in fact he was contemplating death. That essential for a *donatio mortis causa* exists, in my opinion.

Was there delivery to the donee of the subject matter of the gift? It is to be noted at once that an inchoate or imperfect delivery of chattels may be sufficient for effectuating a *donatio mortis causa*: *In re Wasserberg; Union of London and Smith's Bank, Limited v. Wasserberg*, [1915] 1 Ch. 195; "... a transfer of the means of, or part of the means of, getting at the property" is sufficient: *Delgoffe v. Fader, supra*, at p. 927. In *Joseph et al. v. Phillips*, [1934] A.C. 348, [1934] 2 D.L.R. 577, [1934] 2 W.W.R. 113, Lord Warrington of Clyffe, at p. 353 (A.C.), says: "These gifts depend for their validity on the physical delivery to the donee of something the possession of which may confer a title to claim the real subject of the gift."

I shall first consider the matter of the money deposited to the credit of the deceased in the branch of the Province of Ontario Savings Office. The balance standing to the credit of the depositor, as of 17th March 1944, appears from the bank book to be \$2,990.14. That amount is undoubtedly not the true amount owing by the bank to the donor on 9th May 1944, when he handed the bank book to the respondent. The amount of accrued interest to 31st March 1944 had not been added in accordance with the regulations and practice governing the account, and there is no evidence to show whether or not withdrawals had been made from the account between 17th

March and 9th May 1944. Indeed, there is no evidence whatever to prove that on 9th May 1944 there was any sum owing by the bank to the donor. So far as appears from the evidence, the late Davis Brown, after 17th March 1944, might have withdrawn part or all of the sum standing to his credit in the account on that date. There was no requirement, or regulation to prevent the depositor from making a withdrawal from the account without producing the bank book or having an entry made therein at the time of such withdrawal. I reproduce the regulations as printed in the bank book, as follows:—

“THE GOVERNMENT SAVINGS OFFICE.

Regulations.

“1.—Upon the opening of an account with the Government Savings Office, the name, residence and occupation of the depositor shall be declared.

“2.—All deposits must be entered in the Pass Book by the Ledger-keeper when made, and initialed by him.

“3.—Interest will be allowed at such rate and on such terms as the Province shall from time to time establish. The current rate may be ascertained at the branch at any time.

“4.—Interest is not allowed on deposits remaining in the account less than one month. Accrued interest will be added on September 30th and March 31st.

“5.—When an account is closed, the Pass Book must be given up to the branch where the account is carried.”

It will be observed from reg. 5 that “When an account is closed, the Pass Book must be given up to the branch where the account is carried.” But all the money standing to the credit of the account could properly be withdrawn by the depositor without closing the account. It is only when an account is closed that the bank book must be given up. It will be observed too that by reg. 2 “All deposits must be entered in the Pass Book by the Ledger-keeper when made, and initialed by him.” This requirement, in the absence of a similar one relating to withdrawals, lends weight to the view that the bank book was in the nature of a receipt only from the bank to the depositor, and was not in any sense a document entitling the holder of it to claim from the bank the sum of money standing to the credit of the account. The

bank book was not an *indicium* of title to the money in the bank, and the delivery of the bank book by the donor to the respondent did not confer on the respondent a title to claim the moneys due by the bank to the donor: *Joseph et al. v. Phillips, supra*. Nor was the bank book a means, or part of the means, of getting at the money: *Delgoffe v. Fader, supra*, at p. 927.

In *In re Dillon; Duffin v. Duffin* (1890), 44 Ch. D. 76, delivery of a banker's deposit note was held to be a valid *donatio mortis causa* of the moneys represented thereby, but the regulations and requirements in respect to the moneys represented by such a deposit note are clearly distinguishable from the regulations contained in the bank book in the present case. The form of the deposit note contained the express provision that when the money was withdrawn, or the interest was paid, the depositor must sign the cheque on the back of the note. On the back of the note was a form of cheque endorsed to the bank, and it was necessary, in order to withdraw the whole or any part of the money—the subject matter of the note — for the depositor to sign the note. The principle of the case of *In re Dillon, supra*, is stated by Byrne J. in *In re Weston; Bartholomew v. Menzies*, [1902] 1 Ch. 680 at 685, as follows: “. . . the test appears to be whether or not the document, besides acknowledging the receipt of the money, expresses the terms on which it is held, and shews what the contract between the parties is.” But it is pointed out by Kekewich J. in *In re Andrews; Andrews v. Andrews*, [1902] 2 Ch. 394 at 398, that “. . . it was not intended by the learned judge that that should be necessarily exhaustive.” One must inquire whether the terms and regulations as contained in the particular document under consideration are of such a nature as to confer on the possessor of the document a title to claim the subject matter to which it refers. In *In re Beaumont; Beaumont v. Ewbank*, [1902] 1 Ch. 889, Buckley J., at p. 893, considers various subjects which have been held to be good *donationes mortis causa*. At p. 894, he states: “In none of these cases had the donee got the complete title, but he had obtained the indicia of title before the donor's death and as against the legal personal representative he could say, ‘Lend me your name, or give me your indorsement, in order that I may complete my title. There

is a trust in my favour.'” He continues: “In all the cases, in order that the gift may be valid, it must I think be shewn that the donor handed over either property, or the indicia of title to property, which belonged to him.” *In re Dillon, supra*, and other cases touching the question now under consideration were the subject of discussion in *Delgoffe v. Fader, supra*. Luxmoore L.J. accepts the statement of Lord Ashbourne C. in the Irish case of *Duckworth v. Lee*, [1899] 1 I.R. 495, as follows: “In all the cases which have been cited where the gift has been upheld the document or deed delivered was essential to the recovery of the debt.”

What is the legal result of delivery by the donor to the respondent of the bank book in this case? It was not an equitable assignment of the money in the bank. It did not confer a title on the respondent to claim the money, if any, standing to the credit of the donor. It did not give to the donee any dominion whatsoever over the funds in the bank and there was no deprivation of the donor’s facilities for dealing with such funds. The respondent was not placed in a position where she could call upon the personal representative of the deceased to complete her title to the amount owing by the bank to the depositor at the time of delivery by him of the bank book. The bank book was not “essential to the recovery of the debt”: *Duckworth v. Lee, supra*. I conclude and hold, therefore, that the bank book was not the subject matter of a *donatio mortis causa*, and the claim of the respondent to any moneys standing to the credit of the late Davis Brown in the branch of the Province of Ontario Savings Office must fail.

It is argued by counsel on behalf of appellants that the delivery over of the safety deposit box key does not give complete dominion to the alleged donee over the contents in the safety-deposit box. It has been held, as above stated, that delivery of part of the means of getting at the property and of the partial dominion over it is sufficient to constitute valid delivery of the subject matter of the gift: *In re Wasserberg, supra*; *Delgoffe v. Fader, supra*.

When the donor delivered to the respondent the key of the deposit box he transferred to her the only means he possessed of getting at the contents of the box. He parted

with the control and dominion over the contents and with his facilities for dealing with them. The respondent obtained such means and facilities and acquired by possession of the key "a title to claim the real subject of the gift": *Joseph et al. v. Phillips, supra*. After the donor's death she was in a position to demand that his personal representative complete her title by furnishing whatever authority or facilities were necessary to enable her to open the deposit box and take complete possession and title of such contents as in law were the subject of a valid *donatio mortis causa*.

I conclude that there was a valid delivery to the respondent of the mortgages and currency in the safety-deposit box, and that the second essential of a valid *donatio mortis causa* has been satisfied in respect of those items of property.

Was the gift to the respondent made in such circumstances as show that the property was to revert to the donor in case he should recover? This question may be put in other language as follows: Was it intended that the gift should be effective only in the event of the death of the donor? It is not necessary that the donor should expressly state that term or condition at the time the gift is made. The inference may be drawn that the gift was intended to be absolute but only in case of death: *Gardner v. Parker et al.* (1818), 3 Madd. 184, 56 E.R. 478, cited in *In re Beaumont supra*, and *Kendrick v. Dominion Bank and Bownas* (1920), 48 O.L.R. 539 at 542, 58 D.L.R. 309. That inference can and ought to be drawn in this case. It may be noted also from the evidence of Mrs. Usprech that her mother said to the donor when he was crying, and shortly before he went to the hospital, "Don't do that; you will be out again and everything will be as usual." It is quite plain to me that the donee did not intend that the subject of the gift should be retained by her if the donor recovered from his illness, but, on the contrary, that it would revert to him in that event. Likewise the donor intended that the property would belong to the respondent only in the event of his death. This last essential for an effectual *donatio mortis causa* is, in my opinion, satisfied.

It remains only to discuss briefly certain other arguments made by counsel on behalf of the appellants. It was urged that "even if there had been a valid *donatio mortis causa*, the action

should fail because subsequent to the date of the first operation on May 16, 1944, the deceased had effected so complete a recovery that the subject matter of the gift would have reverted to him, and if held by the donee would only be held as trustee for him." The deceased did not effect a complete recovery after the operation performed on 16th May 1944. That operation was the first stage only of the complete operation required to remedy his condition. It may be that it was the more serious stage, but, nevertheless, he continued afterwards to be in a serious condition of health. The evidence does not show that he viewed the future with any different state of mind after the first stage of the operation was completed than he did on 9th May. There is nothing to indicate that he had ceased to contemplate death, or that the intention he had when he made the gift had altered in any way, or to any extent. On the contrary, I think that it may be properly found that he continued at all times after 9th May to think that he would not recover, and he continued to be in a state of contemplation of death.

It is argued that a gift of the kind in question ought to be regarded by the Court with grave suspicion. I quite agree that the proper judicial attitude is to approach the evidence of the respondent with suspicion: *Bayley v. Trusts and Guarantee Co. Ltd.* 66 O.L.R. 254 at 258, [1931] 1 D.L.R. 500. It was also urged that the evidence of the respondent was not corroborated by the evidence of her daughter, Mrs. Usprech. It is not necessary that an independent or disinterested witness testify in support of the plaintiff's evidence. Moreover, the corroboration required by s. 11 of The Evidence Act, R.S.O. 1937, c. 119, need not be of every detail of the respondent's case. It has been held that "it is sufficient if the evidence relied upon as corroborative is evidence of some material fact or facts supporting the testimony to be corroborated": *Ollson v. Fraser, Barned and Powell*, [1945] O.R. 69, [1945] 1 D.L.R. 481. The evidence tendered in corroboration need not be in respect of the vital and essential portion of the respondent's evidence. "All that the statute requires is that the evidence to be corroborated shall be strengthened by some evidence which appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to": *George McKean*

and Company Limited et al. v. Black et al. 62 S.C.R. 290 at 308, 68 D.L.R. 34; *Bayley v. Trusts and Guarantee Co. Ltd., supra*, at p. 258.

Applying these principles, I am of the opinion that the evidence given by the witness Mrs. Usprech affords sufficient corroboration of the evidence of the respondent. All appropriate suspicion of the respondent's evidence is removed from a judicial mind, and the learned judge was quite justified in accepting her evidence.

My opinion is that the appeal should be allowed in part by striking out para. 2 of the judgment of the Court below. In substitution therefor the Court should order that the claim of the plaintiff in respect of any money on deposit in the Province of Ontario Savings Office, Bay and Adelaide Streets Branch, Toronto, being account no. B-1693, in the name of Davis Brown, now deceased, be dismissed. The appeal against all other parts of the judgment should be dismissed.

There should be no costs of this appeal.

HOGG J.A. concurs with ROBERTSON C.J.O.

Appeal allowed in part.

Solicitor for the plaintiff, respondent: J. M. Bennett, Toronto.

Solicitor for the defendants, appellants: Balfour & Sheard, Toronto.

Solicitor for the executor: H. H. Sherman, Toronto.

[McFARLAND J.]

**Re Flavelle Estate; National Trust Company, Limited et al.
v. The Treasurer of Ontario.**

Succession Duties—"Property passing on death"—*Duty Payable out of General Estate—Whether Amount of Such Duty Dutiable as Part of Residue*—*The Succession Duty Act, 1939, 2nd sess. (Ont.), c. 1, ss. 5, 19(1).*

Where a testator directs that succession duties, both on gifts *inter vivos* and on gifts made by the will, shall be paid, out of his general estate, the amount of duties so paid does not pass to the residuary legatees, and is not dutiable as part of the residue of the estate. *Re Flavelle Estate*, [1943] O.R. 169, considered.

TRIAL of three issues under s. 31 of The Succession Duty Act, 1939, 2nd sess. (Ont.), c. 1.

18th January 1946. The issues were tried by McFARLAND J. without a jury at Toronto.

Glyn Osler, K.C., for the executors and for the board of trustees, appellants.

C. F. H. Carson, K.C., and *J. G. Middleton*, for Sir Ellsworth Flavelle, Mina Barrett and Clara McEachren, appellants.

C. R. Magone, K.C., and *L. A. Richard, K.C.*, for the Treasurer of Ontario, respondent.

6th April 1946. McFARLAND J.:—This is a trial held pursuant to the provisions of s. 31 of The Succession Duty Act, 1939, 2nd sess. (Ont.), c. 1. Under the provisions of that section, where it appears to the Treasurer of Ontario that duty may be due and payable he may serve any person by whom such duty is claimed to be payable with a statement showing the amount of duty and interest and particulars as to the computation thereof. A statement was served on each of the three above named appellants. In each case notices of appeal were given on behalf of the present appellants, and in each case there was a decision by the Treasurer affirming the original assessment. The other steps provided for by the section were duly taken, the Treasurer maintaining his position in support of the amount of duty claimed to be payable, and the appellants maintaining their objections thereto. The statute provides for the above notices and certain other material constituting a record to be filed with the local registrar of the Supreme Court of Ontario. Three separate records are before me, deal-

ing with the case of each appellant, but only one point is at issue and the same point is involved in all three cases.

The succession duty claimed by the Treasurer in this proceeding was considered from another angle by Rose C.J.H.C. on an originating notice of motion, in *Re Flavelle Estate*, [1943] O.R. 167, [1943] 1 D.L.R. 756, where the pertinent portions of the will are set forth. By clause IV(g) of the will, the testator directed payment of all succession duties out of his general estate, with the exception of certain estates or interests that were to take effect after the expiration of a life estate.

In the proceeding mentioned, the learned Chief Justice of the High Court found that succession duty payable under clause IV(g), whether on gifts *inter vivos* or on gifts, devises or bequests by the will and codicil, was not itself a dutiable gift or legacy. In deciding this question, he states that he cannot find that any person is liable for duty upon the money that by clause IV(g) of the will is directed to be paid in respect of succession duties (see p. 196).

The statements served by the Treasurer deal with the duty on the residue of the estate. In estimating what the final residue of the estate is, the Treasurer includes the sums paid for succession duty under clause IV(g), making a total sum of \$3,106,162.98, whereas the appellants, not including such sums paid for succession duties, arrive at a gross figure, as to residue liable for taxation, of \$1,777,196.67.

The appellants contended that the matters at issue in this proceeding were *res judicata* under the decision of Rose C.J.H.C. but I am inclined to agree with the contention of Mr. Magone, on behalf of the Treasurer, that the only matter that is *res judicata* is the actual point dealt with in the formal judgment, namely, that duty is not payable on the duty payable under clause IV(g) as additional bequests to the various beneficiaries. However, for the reasons set forth by Rose C.J.H.C., commencing at p. 195 of the report, I am of the opinion that the duty paid pursuant to clause IV(g) of the will did not pass to the residuary legatees in the terms of s. 19(1) of the Act.

There will be judgment declaring that the Treasurer is not entitled to include in the residue the amounts paid for succession

duty. The appellants are entitled to their costs against the Treasurer.

Judgment accordingly.

Solicitors for National Trust Company, Limited and for the Board of Trustees, appellants: Blake, Anglin, Osler & Cassels, Toronto.

Solicitors for Sir Ellsworth Flavelle, Mina Barrett and Clara McEachren, appellants: Tilley, Carson, Morlock & McCrimmon, Toronto.

Solicitor for the Treasurer of Ontario, respondent: L. A. Richard, Toronto.

[COURT OF APPEAL.]

McLellan Properties Limited v. Roberge and Roberge.

Executors—Duty to Act personally—Power of Sale—Delegation to Attorney — Purported Ratification by Executor — Note or Memorandum in Writing.

A trustee in whom is vested a power of sale, to be exercised in accordance with his judgment and discretion, cannot delegate the exercise of that power to another. *Combes's Case* (1614), 9 Co. Rep. 75a; *Bradford v. Belfield* (1828) 2 Sim. 264; *Hitch v. Leworthy* (1842), 2 Hare 200; *In re Boulton's Settlement Trust; Stewart v. Boulton*, [1928] Ch. 703; *Green v. Whitehead*, [1930] 1 Ch. 38, applied. If a contract for the sale of land is made by an attorney for an executor, it is null and void, and, since it does not exist, it cannot be later ratified and adopted by the executor. Nor can an executor authorize an attorney to bind the executor by a written memorandum or note of a contract sufficient to satisfy The Statute of Frauds.

Contracts—Form—Memorandum in Writing—Repudiation—Sufficiency —The Statute of Frauds, R.S.O. 1937, c. 146, s. 4.

Although a letter of repudiation may constitute a sufficient note or memorandum in writing to satisfy s. 4 of The Statute of Frauds, it must be capable of being construed as an admission of the existence and terms of the contract. *Thirkell v. Cambi*, [1919] 2 K.B. 590, applied. Moreover, if the letter is signed, not by the person to be charged, but by some other person, alleged to be "thereunto by him lawfully authorized", within the meaning of the section, it must be affirmatively shown that the authority of the signer was wide enough to enable him to make an admission sufficient to bind the defendant.

AN APPEAL by the defendants from the judgment of Mackay J., [1945] O.W.N. 771, [1946] 1 D.L.R. 77, decreeing specific performance of an alleged agreement for the sale of land.

14th and 15th March 1946. The appeal was heard by HENDERSON, LAIDLAW and ROACH JJ.A.

A. G. Slaght, K.C., for the defendant Antoine Roberge, appellant: This agreement is not certain, fair and just in all its parts, within the rule as to granting specific performance, as laid down in Fry on Specific Performance, 6th ed. 1921, p. 155, para. 334, quoting from *Buxton v. Lister et al.* (1746), 3 Atk. 383, 26 E.R. 1020.

The plaintiff takes subject to all equities existing as against Wright; it can be in no higher position than he would be: The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 52. [LAIDLAW J.A.: The effect of that section was considered in *Slattery v. Slattery et al.*, [1945] O.R. 811 at 822, [1946] 1 D.L.R. 304, where reference was made to *Trubenizing Process Corporation v. John Forsyth, Limited* [1943] S.C.R. 422 at 428, 3 Fox Pat. C. 123, 3 C.P.R. 1.] We should have had notice in writing that there was a valid assignment: *Capital Coach Lines Limited v. Hagan* [1945] O.W.N. 684, [1946] 1 D.L.R. 147.

No written acceptance of the offer was ever given to L. D. Roberge, who made the offer, and no memorandum was ever signed by Antoine Roberge sufficient to satisfy s. 4 of The Statute of Frauds, R.S.O. 1937, c. 146. There can obviously be no judgment for specific performance against L. D. Roberge: *Beer v. Lea* (1913), 29 O.L.R. 255, 14 D.L.R. 236.

The inequality of the parties, and the betrayal of the defendants by Wright, with the approval of the plaintiff, is good ground for refusing specific performance: *Bank of Montreal v. Stuart et al.*, [1911] A.C. 120, C.R. [1911] 1 A.C. 1; *McKenzie (MacKenzie) v. Royal Bank of Canada*, [1934] A.C. 468, [1934] 4 D.L.R. 1, [1934] 2 W.W.R. 620.

James Cowan, K.C., for the defendant L. D. Roberge, appellant, associated himself with the above argument, and had nothing to add.

R. M. W. Chitty, K.C., for the plaintiff, respondent: The series of letters constitutes irresistible evidence, from which it must be taken that the whole conduct of the defendants and their solicitor is inconsistent with anything except an intention to carry through the contract. It was held in *Gordon v. Jones* (1944), 14 Fort. L.J. 36, that while an executor could not delegate power to an attorney or agent to negotiate a sale, there was nothing to prevent his delegating the power to make

a sufficient memorandum to satisfy s. 4 of The Statute of Frauds, and that if the executor and trustee subsequently ratified and adopted the contract the defence under The Statute of Frauds must fail. Here the executor undoubtedly ratified and adopted the contract, and to allow the statute to be raised as a defence would make it an instrument of fraud.

Bank of Montreal v. Stuart et al., *supra*, and *McKenzie v. Royal Bank of Canada*, *supra*, were both cases of husband and wife, and are clearly distinguishable, and do not support the proposition advanced by the appellants.

No agency was ever established, because the first time any defined relationship became crystallized it was one of vendor and purchaser.

One of the grounds of repudiation was that the executor had no power to sell the land. The solicitor for the executor, in answer to requisitions, stated that the land was being sold to pay debts, and the executor would therefore have ample powers under ss. 19 and 20 of The Devolution of Estates Act, R.S.O. 1937, c. 163, to sell the lands without the consent either of the life tenant or of the remaindermen: see *In re Fletcher's Estate* (1895), 26 O.R. 499.

As to the defendants' claim that the purchaser had raised objections to title which the vendor was unable or unwilling to remove, the only objection raised was that referring to the consent of the heirs-at-law, and the vendor's solicitor was later told that that objection would be waived, and it was in fact waived by a letter.

A. G. Slaght, K.C., in reply, referred to Williams on Personal Property, 18th ed. 1926, p. 38, and *Tolhurst v. The Associated Portland Cement Manufacturers (1900) Limited*, [1903] A.C. 414.

Cur. adv. vult.

18th April 1946. The judgment of the Court was delivered by

Laidlaw J.A.:—The defendants appeal from a judgment of Mackay J., dated the 9th day of October 1945, granting to the plaintiff in the action a decree of specific performance of an alleged agreement for the sale of certain lands and premises. (Reported [1945] O.W.N. 771, [1946] 1 D.L.R. 77).

Georgianna Roberge died on or about the 14th day of January 1943, leaving her husband L. D. Roberge, one of the appellants, and a son Antoine Roberge, the other appellant, and also other children, surviving her. Letters probate of the estate of the deceased were granted to the appellant Antoine Roberge, the executor named in the will.

All the real estate, personal estate and effects of the deceased were devised and bequeathed by the will to the executor and trustee upon trust to the use of the appellant L. D. Roberge during his life and, after his death, to sell, call in and convert the estate and effects into money.

Certain lands and premises situate in the town of Kirkland Lake, Ontario, formed part of the real estate of the deceased, and under date the 10th day of May 1944 the appellant L. D. Roberge signed and sealed a document, captioned "Option to Purchase", and alleged by the respondent to contain the terms and conditions of an agreement to sell the said lands and premises. The document purports to evidence an agreement between "L. D. Roberge, Attorney for Estate of Georgianna Roberge", called in the document "the Vendor", and A. I. Wright, called "the Purchaser". The document is executed in the following form: "Attorney for Estate of the late Georgianna Roberge 'L. D. Roberge'". It is witnessed by "A. I. Wright". On 5th June 1944, A. I. Wright sent a letter addressed to "Reverend Father Antoine Roberge, Executor for Estate of Georgianna Roberge", from which I quote, in part, as follows:

"Take notice that I hereby accept the offer of sale made by you dated May 10th, 1944 covering the sale of the lands and buildings . . . [description follows].

"I am turning the agreement over to my solicitor L. A. Lillico, who no doubt will contact your solicitor, Mr. A. St. Aubin . . .

"In accordance with our telephone conversation of this date and your instructions, we are forwarding a copy of this notice registered mail to your solicitor Mr. St. Aubin . . ."

Under date 19th June 1944, Arnley I. Wright executed a form of assignment to the respondent of all his right, title and interest in the lands and premises "under the terms of an agreement under an Offer of Sale, dated the 10th of May 1944 . . ."

After the 10th May 1944, there was a course of correspondence between Messrs. Lillico and Macpherson, solicitors acting on behalf of Mr. Wright, and Mr. St. Aubin, who appears to have been acting for the owner of the property. The matter of requisitions on title was the subject of discussion, and notice of the assignment to the respondent, together with a copy thereof, was given by Mr. Wright's solicitors to Mr. St. Aubin. On 3rd July 1944 Mr. St. Aubin wrote a letter to Messrs. Lillico and Macpherson from which I quote in part:

"Re: Georgianna Roberge Estate et al.

"Referring to the alleged offer to sell and acceptance thereof and the alleged assignment to McLellan Properties Limited, I am instructed by the executor of the will to notify you that he will not proceed further with this matter for the following reasons (among other reasons):

"1. L. D. Roberge had no power to execute the said offer of sale on behalf of this estate, and the said offer of sale is a nullity;

or in the alternative,

"2. The executor has, at this time, no power to sell the lands of this estate;

or in the alternative,

"3. The vendor is unable and/or willing to remove the objections made by you on behalf of the purchaser and/or his assignee. The vendor therefore rescinds the agreement herein."

On 28th August 1944 the following letter was sent by the appellant Antoine Roberge, addressed to "Mr. Walter McLellan, Secretary, McLellan Properties Ltd., Kirkland Lake, Ont., Canada":

"I understand that the McLellan Properties Ltd., have taken legal procedures against my father, concerning the option of sale of your property to Mr. Wright and then to your Company.

"The option of sale signed by my father to Mr. Wright is invalid and void since it goes against one clause of the will of my late mother, which clause states 'that the sale of the property should be made but after the death of my father'. I took a legal advice on that matter here in Flint and I am determined, as Trustee and Executor of my mother's will to fulfill my duties in the present instance, I would then advise your Company to withdraw the action against my father and wait till things

clean up. Some day, may this be said without any formal engagement from my part, we may be able to fix everything to the benefit of all. Actually nothing good can come out of this imbroglio.

"Hoping that you will understand my situation as Trustee and Executor, towards the heirs who refuse to sell, I remain, as ever".

There were a number of questions argued before the Court, but I find it necessary to consider and decide one of them only, namely, whether or not there is an enforceable contract between the parties. The appellants say, firstly, that no contract was made, and secondly, that, in any event, no action can be brought upon any such contract because there is no memorandum or note thereof in writing signed by the party to be charged therewith or some person thereunto by him lawfully authorized within the meaning of s. 4 of The Statute of Frauds, R.S.O. 1937, c. 146.

It is well settled that a power of sale, exercisable by a trustee in accordance with his judgment and discretion, cannot be referred by him to the execution of another: Williams on Executors, 12th ed. 1930, p. 598: *Combes's Case* (1614), 9 Co. Rep. 75a, 77 E.R. 843; *Bradford v. Belfield* (1828), 2 Sim. 264, 57 E.R. 788; *Hitch v. Leworthy* (1842), 2 Hare 200, 67 E.R. 83; *In re Boulton's Settlement Trust*; *Stewart v. Boulton*, [1928] Ch. 703; *Green v. Whitehead*, [1930] 1 Ch. 38, referred to by the learned trial judge. Thus any power of sale possessed by the appellant Antoine Roberge in his capacity as executor of the estate of Georgianna Roberge could not be delegated by him to the appellant L. D. Roberge. He could not contract to sell by attorney. The absence on the part of L. D. Roberge of power to make a contract of sale binding on the appellant Antoine Roberge makes the transaction between L. D. Roberge and Arnley I. Wright, on 10th May 1944, null and void. There was no contract in law then made, and I must respectfully dissent from the judgment of the learned trial judge that Antoine Roberge "adopted and ratified that contract". He could not adopt or ratify what did not exist. It may be that the acts and conduct of the appellant Antoine Roberge, and likewise of L. D. Roberge, were such, in relation to Mr. Wright and subsequently to the respondent, as to make them parties to

an agreement for the sale of the lands and premises in question, or to preclude them from denying that fact. I do not need to decide that question, because, even though it be decided favourably to the respondent, the alleged contract cannot be enforced unless there be a memorandum or note in writing sufficient to satisfy the requirements of s. 4 of The Statute of Frauds.

It is contended by counsel on behalf of the respondent that the document dated 10th May 1944, is a sufficient memorandum or note to satisfy the provisions of the statute. It is said that, while the executor could not delegate power to the attorney or agent to negotiate the sale, there was no reason why the power to make a memorandum sufficient to satisfy The Statute of Frauds should not be delegated. I think that a trustee, who is not able in law to refer the execution of his power of sale to an attorney, cannot lawfully authorize another to sign a memorandum or note in writing sufficient to satisfy the requirements of s. 4 of The Statute of Frauds and thus enable an action to be brought against him upon an alleged contract for the sale of lands. The document dated 10th May 1944 does not, in my opinion, constitute a sufficient memorandum or note in writing within the meaning of the statute.

Is there a sufficient writing to be found elsewhere? There are two possible sources that might be suggested: First, the letter dated 3rd July 1944, headed "Re: Georgianna Roberge Estate et al.", from Mr. St. Aubin, purporting to be written on instructions by the executor of the will to solicitors for Mr. Wright and the respondent. That letter refers expressly to the "alleged offer to sell and acceptance thereof", and sets forth the reasons the appellant Antoine Roberge will not proceed with the matter. It concludes, "The Vendor therefore rescinds the agreement herein." The contents of this letter may be properly read with the "offer to sell" and "acceptance thereof" for the purpose of satisfying the requirements of the statute, and that may be done notwithstanding that the letter repudiates liability on the contract: *Thirkell v. Cambi*, [1919] 2 K.B. 590. I am disposed to think that the letter referred to recognized that a contract had been made and that its terms were correctly stated in the offer to sell. But, again, it is not necessary to decide that question because, to make that letter effective in

law, the respondent must show that Mr. St. Aubin was authorized to make an admission sufficient to bind the appellant Antoine Roberge to the contract set up by the respondent: *Thirkell v. Cambi, supra*, at p. 595. Even if the appellant Antoine Roberge could lawfully authorize his solicitor Mr. St. Aubin (or any other person) to sign a writing sufficient to satisfy The Statute of Frauds—which, in my opinion, he could not do—I think there is no evidence in this case that he had done so. There is no evidence of any actual authority given to Mr. St. Aubin, and the necessary authority cannot be implied from the form or contents of the letter. On the contrary, his instructions were to repudiate the contract. “. . . the plaintiff cannot succeed unless he has affirmatively proved that the agent was authorized to sign a memorandum of the particular contract on which the plaintiff claims”: *Thirkell v. Cambi, supra, per Eve J.*, at p. 599. This the plaintiff has failed to do.

The second possible source of a memorandum or note to meet the requirements of the statute is the letter from the appellant Antoine Roberge to Mr. Walter McLellan dated 28th August 1944. This letter is subsequent in date to the issue of the writ of summons on 17th August 1944, and objection to its sufficiency might possibly be taken on that ground. It refers to the option of sale, but, in my opinion, there is nothing in it which can be construed as an admission of the existence of the contract upon which the respondent brings this action, or an admission of what that contract was: *Thirkell v. Cambi, supra*, at p. 597.

The action is based upon an alleged contract between L. D. Roberge, “as Attorney of the Estate of the late Georgianna Roberge”, and Arnley I. Wright. For the reasons I have given, I think that no such contract was proved, and, in any event, no action can be brought upon such an alleged contract because of the absence of a memorandum or note thereof in writing sufficient to satisfy the provisions contained in s. 4 of The Statute of Frauds.

The appeal should, therefore, be allowed with costs. Judgment in the court below should be varied and as varied should be that the action be dismissed with costs and the counterclaim dismissed without costs.

Appeal allowed with costs.

Solicitors for the plaintiff, respondent: Lillico & Macpherson, Kirkland Lake.

Solicitors for the defendant Antoine Roberge, appellant: Slaght, Ferguson & Carrick, Toronto.

Solicitor for the defendant L. D. Roberge, appellant: James Cowan, Toronto.

[COURT OF APPEAL.]

Re Ness and Incorporated Canadian Racing Associations.

Certiorari—When Remedy Available—Acts of Body not a Court—Judicial and Administrative Functions—Interest of Community—Duty Imposed to Act Judicially—Internal Management of Racing Association—Permissive Powers.

Certiorari will not lie to review the acts or decisions of a body which is not a court *stricto sensu*, unless there is imposed upon that body a legal authority to determine questions affecting the rights of individuals, and a duty to act judicially. This legal authority and duty are generally imposed by statute, in the interest of the community.

The respondent was given power, by its letters patent, to adopt such rules as might appear necessary for the furtherance of its objects, which were, in general, to improve conditions of horse-racing. In purported compliance with rules so adopted, the respondent suspended the appellant's licence as a trainer.

Held, the respondent's acts were not subject to review on *certiorari*. There was no duty imposed upon it to adopt rules, or to act judicially, but merely permissive powers, which could not be said to be in the interest of the community.

Review of authorities.

AN APPEAL by the applicant from the order of Barlow J., [1946] O.W.N. 54, [1946] 2 D.L.R. 267, dismissing a motion for an order in the nature of *certiorari*.

11th March 1946. The appeal was heard by HENDERSON, ROACH and HOGG JJ.A.

J. R. Cartwright, K.C. (*H. M. Finkle* with him), for the applicant, appellant: The respondent's directors cancelled the appellant's licence without giving him notice of the meeting, laying any charge against him, or affording him an opportunity of being heard. This is contrary to natural justice: *Re Brown and Brock and The Rentals Administrator*, [1945] O.R. 554 at 560, 561, [1945] 3 D.L.R. 324. The directors were in effect deciding whether or not we should have a licence, and there is nothing in the respondent's rules that gives us any recourse. They were without jurisdiction: *The Bonanza Creek Hydraulic*

Concession v. The King (1908), 40 S.C.R. 281; Broom's Legal Maxims, 10th ed. 1939, p. 65.

Two of the directors who took part in the meeting were likely to be biased, being competitors of the applicant during the 1945 season: Broom, *op. cit.*, p. 68; Tremear's Criminal Code, 5th ed. 1944, pp. 815 *et seq.* Actual bias need not be shown; the mere possibility is sufficient to disqualify: *Reg. v. Huggins*, [1895] 1 Q.B. 563 at 565.

The matter involves a substantive right of the appellant, and the trial judge was wrong in concluding that *certiorari* would not lie, on the ground that the board of directors is an administrative rather than a judicial body. The respondent controls all racing in the Province and has set up an elaborate code of rules. Here it was deciding whether or not the appellant should have a licence, and this was a judicial proceeding, so that the greatest care must be taken to avoid any infringement of the appellant's rights and to see that the directors did not exceed their jurisdiction: *Rex v. Woodhouse et al.*, [1906] 2 K.B. 501; *Reg. v. The London County Council*; *Ex parte Akkersdyk*; *Ex parte Fermentia*, [1892] 1 Q.B. 190; *Rex v. The London County Council*; *Ex parte The Entertainments Protection Association, Limited*, [1931] 2 K.B. 215. The law respecting the right to a licence in such circumstances is set forth in *Hurst v. Picture Theatres, Limited*, [1915] 1 K.B. 1. [HENDERSON J.A.: Surely the appellant has no right to a licence unless the respondent chooses to give him one.]

As to the jurisdiction of this Court to grant *certiorari* or prohibition, we refer to *Rex v. Electricity Commissioners*; *Ex parte London Electricity Joint Committee Company (1920), Limited, et al.*, [1924] 1 K.B. 171. Under Rule 8 of the respondent, it has power, in its discretion, to revoke licences of trainers, jockeys and others. This requires that it shall act judicially, and not according to mere caprice: Tomlin's Law Dictionary, 1835, s.v. "discretion"; Burrows, Words and Phrases, 1943, vol. 2, p. 105; Words and Phrases, perm. ed. 1940, vol. 12, p. 592; 9 Halsbury, 2nd ed. 1933, p. 878; *Rex v. Postmaster-General*; *Ex parte Carmichael*, [1928] 1 K.B. 291 at 299. While the particular circumstances in this case are novel, the underlying principle is plain.

G. W. Mason, K.C. (*F. W. Fisher* with him), for the respondent: The board of directors is not a judicial body; it does not exercise judicial functions or impose legal duties or obligations. There is no case where *certiorari* has been issued to a body of this character. This is purely a voluntary association. It does not control race-tracks, or any of its members.

The appellant knew the rules. His rights (if any) are contractual, and depend upon the contract, *viz.*, the application for a licence and the licence granted in pursuance of that application. It was a term of the appellant's licence that it was revocable at any time, or that he might be suspended for any length of time, and he is estopped from questioning such a revocation or suspension. The appellant had agreed to observe and obey the rules, and these rules must be regarded as setting out the full terms of the contract: *Maclean v. The Workers' Union*, [1929] 1 Ch. 602. He was familiar both with the rules and with the board's procedure: *Heller v. Niagara Racing Association*, 56 O.L.R. 355, [1925] 2 D.L.R. 286. This procedure was customary procedure; *Scully v. Madigan* (1912), 4 O.W.N. 394, 23 O.W.R. 876, and the appellant was bound first to exhaust his remedies under the rules and the board's customary procedure: *Essery v. Court Pride of the Dominion* (1882), 2 O.R. 596; *Zilliax v. Independent Order of Foresters* (1906), 13 O.L.R. 155.

The appellant might also have brought an action for a declaration as to his rights, or for damages: *Baird v. Wells* (1890), 44 Ch. D. 661. But the courts will not interfere unless a property interest is involved: *Rigby v. Connol* (1880), 14 Ch. D. 482. The appellant's licence was a personal right only, and in its nature revocable: *Hurst v. Picture Theatres, Limited*, *supra*.

The fact that two members of the board of directors had on occasion entered their horses in competition with horses trained by the appellant did not disqualify them or render the board's decision void. There was only one body that could act in this matter, and that was the board. If its members were disqualified, then no one could act.

This is not a case for *certiorari*: *In re Clifford and O'Sullivan*, [1921] 2 A.C. 570; *In re Godson and The City of Toronto* (1889), 16 O.A.R. 452; *Reg. v. The Court of the Company of*

Watermen and Lightermen of the River Thames, [1897] 1 Q.B. 659; *In re Thomas's Licence* (1895), 26 O.R. 448. As to what constitutes a judicial proceeding, and when there is a duty to act judicially, we refer to *Re Brown and Brock and The Rentals Administrator, supra*, and to the article, "‘Administrative’ Tribunals and the Courts", 49 L.Q.R. p. 94. In many of the cases cited for the appellant, such as *Rex v. Woodhouse* and the *Entertainments Protection Association* case, *supra*, the inferior body consisted of justices, and not of a body of laymen, as here, and there was a direct and definite direction to adjudicate. This board is not a judicial body, but a body administering the affairs of the respondent. It is not a legal tribunal, and has no power to impose legal duties on individuals. It must act speedily, or it will act uselessly. From his own evidence, it appears that the appellant knew that he had a remedy, by going to the board, which he did not choose to exercise. The granting of *certiorari* is always discretionary: *C. S. Windsor, Limited v. Windsor* (1912), 17 B.C.R. 105, 21 W.L.R. 137, 3 D.L.R. 456; *Young v. Ladies' Imperial Club, Limited* [1920] 2 K.B. 523.

J. R. Cartwright, K.C., in reply: While it is true that this board is not created by statute, the respondent has built up a system whereby it controls all racing in Ontario. The board has a power that transcends the contractual relationship between it and the appellant.

Cur. adv. vult.

18th April 1946. The judgment of the Court was delivered by

HOGG J.A.:—By resolution passed at a meeting held on the 15th September 1945, the Board of Directors of the Incorporated Canadian Racing Associations suspended the appellant Douglas Ness and one Ross Cochrane, indefinitely, from all race courses under the jurisdiction of the said association "for practices detrimental to the best interests of racing". All horses in the care of the appellant were also suspended.

The appellant made application to Barlow J. for an order by way of *certiorari* directing the respondents to bring into court all proceedings with regard to the said resolution that the matter might be reviewed, and for an order staying the suspension of the appellant. The grounds upon which the

application was based are: that the ruling of the Board was made *ex parte*, without Ness having been given an opportunity of being heard or of refuting any charges of wrongdoing made against him, and that the ruling was, therefore, void and of no effect. The application was dismissed by Barlow J. by order of the 4th December 1945, and the appellant now appeals from this order.

The Incorporated Canadian Racing Associations were granted letters patent of the Province of Ontario on the 6th January 1933, being thereby constituted a corporation without share capital, and the members thereof are the original subscribers and any other persons who become members. The objects of the Associations are, *inter alia*: to afford protection to such racing associations and jockey clubs as may hereafter desire to operate under the jurisdiction of the corporation; to promote and protect the interests of horse owners, trainers and jockeys; and "(g) For any of the above purposes, to make all necessary rules and regulations, to collect forfeits and to impose fines and make contracts or agreements to enforce regulations and decrees of the English Jockey Club or the New York Jockey Club and all other turf governing bodies having a reciprocal agreement with each other or with the Corporation and generally to elevate horse racing to a higher plane". The business of the Associations is carried on by a board of directors elected by the members.

On the 14th May 1945, Ness applied in writing to the secretary of the respondents for a licence as a trainer and pledged himself to obey the rules and regulations of the Associations. The form of application for the licence signed by Ness has printed upon it a notice to the effect that the licence must be applied for annually and that it may be suspended or revoked at any time by the committee of the Incorporated Canadian Racing Associations. The appellant received a licence describing him as a "licensed trainer", for which he paid the sum of \$20. The object of such licences, according to the evidence given by Mr. James Heffering, the secretary of the respondent Associations, is to endeavour to insure that only reputable and capable trainers are engaged in training horses upon the race tracks which operate under the jurisdiction of, and which accept the authority and rulings of, the Associations.

The respondents have formulated certain rules entitled "Rules of Racing", and Part IV of these rules, headed "Powers of Incorporated Canadian Racing Associations", reads as follows:

"8. (I.) Incorporated Canadian Racing Associations shall have power at their discretion to grant and cancel approval to Racing Associations to conduct recognized meetings, and to grant and revoke licenses to trainers, jockeys and others.

"(II.) They shall have power to make enquiry into and deal with any matter relating to racing, and to rule off any person or persons concerned in any fraudulent practices on the turf.

"(III.) They shall hear cases on appeal as provided for in these rules, and their decision shall be final."

Rule 133 provides for a notice of appeal to be given within forty-eight hours of a decision being made known. It is not clear from the language of this rule whether the provision respecting appeals applies only to objections concerning matters to be decided by the stewards, or whether the proceeding set out in this rule relates to appeals contemplated by Rule 8 (III), already referred to. There seems to be no other provision as to how an appeal shall be made except that contained in Rule 133.

Part XXIII of the rules is headed "Corrupt Practices and Disqualifications of Persons and Horses". Rule 159 (VI) reads:

"Any person who shall have administered a drug or stimulant, internally or by hypodermic method, prior to a race, or who shall have used appliances, electrical or mechanical, other than the ordinary whip or spurs; every person so offending (as outlined in above paragraphs) may be ruled off."

On the 14th September 1945, an electric battery was found in a coat in the Ness stable. This was at once brought to the attention of the president and secretary and one of the directors of the respondent Associations, who discussed the matter with Ness, who was then told he would hear from the directors. On the following day, at noon, a directors' meeting was held, of which notice was given to all available directors, and four out of the seven directors comprised the meeting. The appellant was not notified of the meeting and was not present thereat. Certain information was placed before the directors, being

presented by an officer of a detective agency, an official of the Associations, a groom at one time in the employ of the appellant, and a member of the Provincial police, to the effect that batteries or "joints" had been used on horses trained by the appellant, with his knowledge. As a result of the information presented to the directors, a resolution was passed suspending the appellant and Cochrane and a notice of the resolution, dated the 15th September 1945, was posted on the bulletin board at the Woodbine race track. The appellant states that he received a copy of this notice on the day it was posted up, but did not enter an appeal.

The appellant had several horses which he was training at the time of his suspension, and, as a result of his licence being suspended, he was not permitted to train horses on any race course connected with the respondent Associations.

The words of Lord Justice Atkin in *Rex v. Electricity Commissioners; Ex parte London Electricity Joint Committee Company (1920), Limited et al.*, [1924] 1 K.B. 171 at 205, have been quoted in very many cases in which the subject of *certiorari* is under discussion. He said:

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

In *Rex v. Legislative Committee of the Church Assembly; Ex parte Haynes-Smith*, [1928] 1 K.B. 411, Lord Hewart C.J. said, at p. 415:

"In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially . . . these writs do not issue except to bodies which act or are under the duty to act in a judicial capacity."

And Salter J. in the same case, referring to *certiorari* in its application to a person or body acting in a judicial capacity, said, at p. 420:

"The widest statement of the rule, and one very frequently quoted, is to be found in the judgment of this Court delivered

by Holt, C.J., in *Rex v. Inhabitants—in Glamorganshire* [(1700) 1 Ld. Raym. 580, 91 E.R. 1287], 'This Court will examine the proceedings of all jurisdictions erected by Act of Parliament.' It is to be noted that the word used is 'Jurisdictions'. The Chief Justice did not say: 'This Court will examine the proceedings of all persons or bodies entrusted by Parliament with powers,' or 'with powers which may result in affecting people's rights,' as all powers must do . . . I think that the Church Assembly has authority, exceedingly wide and important authority, but nothing that can properly be called jurisdiction." The *Glamorganshire* case was referred to in *Ex parte Jocelyn*, (1853), 7 N.B.R. 637, in the Court of Appeal, where it was said that, as a general rule, the Court of King's Bench will examine the proceedings of all jurisdictions created by Act of Parliament, and will send a *certiorari*.

In what manner is "legal authority", as distinguished from mere "authority", conferred upon a body of persons in the sense that their acts may be subject to *certiorari*?

In *Board of Education v. Rice et al.*, [1911] A.C. 179, Lord Loreburn L.C., at p. 182, said:

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds."

In *Errington et al. v. Minister of Health*, [1935] 1 K.B. 249, the Court referred to certain bodies exercising quasi-judicial functions, upon whom Parliament has imposed duties by statute, of determining questions of various kinds which might be the subject of *certiorari*. Greer L.J. said, at p. 265, quoting Viscount Haldane L.C. in *Local Government Board v. Arlidge*, [1915] A.C. 120 at 132:

"In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court . . . Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community."

The many licensing cases in which *certiorari* is discussed are those where it is the duty of a magistrate, or magistrates,

or some other confirming body authorized by statute, to decide whether a licence should be granted or withheld. In *Rex v. The London County Council; Ex parte The Entertainments Protection Association, Limited*, [1931] 2 K.B. 215, Scrutton L.J. said, at p. 234, that since the case of *Rex v. Woodhouse et al.*, [1906] 2 K.B. 501, "it is quite clear that every proceeding of magistrates or confirming authorities in granting new or renewing old licences is in the nature of a Court, excess of jurisdiction in which can be dealt with by the writ of certiorari." In the same case Slessor L.J., at p. 244, referred to the application for a licence under the Cinematograph Act as being the same in principle to "an application made with regard to a licence for a public house, which for many years . . . has been held to be a judicial act." Fletcher-Moulton L.J. in *Rex v. Woodhouse et al.*, *supra*, at p. 535, said: "there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law."

In *Rex v. Hendon Rural District Council; Ex parte Chorley*, [1933] 2 K.B. 696, Humphreys J. discussed the question of the meaning of the words "to act judicially" in the judgment of Atkin L.J. in the *Electricity Commissioners* case and referred to the statement of Fletcher-Moulton L.J. in the *Woodhouse* case, that there must be the exercise of some right or duty to decide.

From a review of the cases where *certiorari* has been granted with respect to the ruling of a body which is not a court in the sense that this is a court, and where such body has, after hearing evidence, exercised judicial functions in the sense that it has decided rights affecting a person, or persons, it may be concluded that the authority so to act has been conferred by statute.

In order that *certiorari* may lie, the body whose acts are in question must have imposed on it a duty to decide, as for example, the duty cast upon the magistrate, or other authority, to grant or withhold a licence in connection with a public house. Where there is no such duty imposed by law upon a person, or body of persons, although matters which affect the rights of individuals may be the subject of adjudication, *certiorari* cannot be granted. An illustration of this principle is found in the case of *Wayman v. Perseverance Lodge of the Cambridgeshire*

Order of United Brethren Friendly Society, [1917] 1 K.B. 677. There, the Friendly Society Act provided that a dispute between members of the Society should be decided in the manner directed by the rules. A writ of prohibition was applied for and obtained. In this case a duty was cast upon the Society, by the statute, of deciding matters which came before it under certain rules or regulations.

The question then presents itself as to whether there is imposed upon the respondent Associations any right or duty in the sense of the obligation imposed "in the interest of the community", such as was referred to in the judgment of Greer L.J. in the *Errington* case, or what I think may be called any public jurisdiction, with respect to the determination of matters falling within the provisions of the rules of the respondent Associations.

It is true that the letters patent of the respondents empower them to make such rules as they may think necessary to carry out their obligations in a proper manner, but this jurisdiction cannot, in my opinion, be said to be in the interest of the community. There is no duty cast upon the respondent Associations by their letters patent to decide any matter. They merely have the right to formulate rules for the conduct of the business which constitutes the objects of the Associations, if they should deem such rules to be necessary, but they are under no legal obligation to do so.

A trainer's licence is granted for a special purpose only. Such purpose is connected with, and relates solely to, the management and the internal arrangements of the respondent Associations. Whether a licence is granted or suspended depends altogether upon the judgment and opinion of the directors as to what may be necessary or expedient under the circumstances, and the directors do not derive their authority to act from any outside source, other than the letters patent, which brought the respondent Associations into being. The respondents have not "legal authority" to determine questions brought before them, as that phrase is used by Atkin L.J. in the *Electricity Commissioners* case.

I have concluded that the decision of the respondents, in suspending the licence held by the appellant, is not a subject for *certiorari*. It is possible that the appellant may have a right

of action based upon the principle stated by Jessel M.R. in *Rigby v. Connol* (1880), 14 Ch. D. 482, and followed in many cases, both in England and in our own courts, such as *Cuthbert v. The Commercial Travellers' Association of Canada* (1876), 39 U.C.Q.B. 578, down to the more modern case of *Kemerer v. Standard Stock and Mining Exchange* (1927), 32 O.W.N. 295, but that question is one apart from the issue raised by this appeal.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Smith, Rae, Greer & Cartwright, Toronto.

Solicitors for the respondent: Ludwig, Fisher & Holness, Toronto.

[COURT OF APPEAL.]

Rex v. Ashall.

Intoxicating Liquors—Seizure and Confiscation of Automobile wherein Liquor Unlawfully Kept—Nature of Proceedings—Notice—The Liquor Control Act, R.S.O. 1937, c. 294, ss. 130, 131.

Proceedings under s. 131 of The Liquor Control Act for the confiscation of an automobile seized under that section (as being one in which liquor has been unlawfully kept) are proceedings *in rem*, and an order of forfeiture, if pronounced, is a judgment *in rem*, binding on all the world. It follows that it is unnecessary, before such an order is made, that notice should be given to the alleged owner of the automobile, or that he should be afforded an opportunity, if he does not himself intervene, to be heard. *Sleeth v. Hurlbert* (1896), 25 S.C.R. 620, applied; *McNeil v. McGillivray et al.* (1907), 42 N.S.R. 133, agreed with; *In re Prohibition Act and Tosey* (1921), 29 B.C.R. 438, discussed.

Intoxicating Liquors — Appeals — Limitations on Powers of Judge — Materials to be Considered — R.S.O. 1937, c. 294, s. 156.

By s. 156(12) of The Liquor Control Act, an appeal is to be heard and determined upon the evidence and proceedings had and taken before the justice, together with the affidavit of *bona fides* of the accused, required by subs. 2 of s. 156 as a condition precedent to the hearing of the appeal. The contents of this affidavit are prescribed by subs. 15, and an accused appellant, who has not given evidence before the justice, should not be permitted to include in his affidavit statements of fact which did not appear in the evidence at the trial. Nor should the County Court Judge, on the hearing of the appeal, receive and consider affidavits from other persons, not called before the justice.

AN APPEAL by the informant from an order of Currey Co. Ct. J., in the County Court of the County of York, varying a conviction under The Liquor Control Act, R.S.O. 1937, c. 294, by striking out an order for the forfeiture of an automobile seized under s. 130 of the Act.

23rd April 1946. The appeal was heard by ROBERTSON C.J.O. and HOPE and HOGG JJ.A.

W. B. Common, K.C., for the informant, appellant: The appeal was by Ashall against his "conviction". His affidavit, filed in support of the appeal, did not comply with the form prescribed by s. 156(15) of The Liquor Control Act, R.S.O. 1937, c. 294, and contained extraneous matter, which should not have been permitted or considered. The County Court Judge should not have permitted the use of the affidavit of Kathleen Thomas, who had not given evidence before the magistrate. Subs. 12 of s. 156 requires that the appeal shall be determined on the evidence and proceedings before the magistrate.

The County Court Judge lacked jurisdiction to hear the appeal at all. It was not in reality an appeal against the conviction, but was against the order of confiscation of the automobile. Section 156(1) provides for an appeal by "Any person convicted", and subs. 12 limits the materials, and allows the judge only to affirm, reverse or amend the conviction. Subs. 15 contemplates an appeal against sentence alone, and subs. 16 limits the appeals that may be taken. An order of forfeiture is not within the words "order" in subs. 16. The only other reference to an "order" in s. 156 is in subs. 14, which refers to an order of dismissal. An order of confiscation is neither a conviction nor a sentence.

This respondent is not affected, because he did not own the car: *Rex v. Martin*, [1944] O.W.N. 19; *Rex v. Miles*, 9 M.P.R. 554, 65 C.C.C. 88, [1936] 1 D.L.R. 186; *Bell Telephone Company v. Regem and Rozon* (1937), 62 Que. K.B. 559. Confiscation proceedings are *in rem*, and it therefore cannot be suggested that the person convicted is "aggrieved" by them. [ROBERTSON C.J.O.: He might be civilly liable to the owner.]

There is nothing in the Act providing for such a procedure as is suggested by the County Court Judge. The procedure is prescribed by s. 130, and there is no provision for notice to third persons. [ROBERTSON C.J.O.: The magistrate need not make an order of forfeiture.] No, the section is wholly permissive. In *Rex v. Nadan*, 21 Alta. L.R. 231, [1925] 1 W.W.R. 127, 43 C.C.C. 209, [1925] 1 D.L.R. 465, the confiscation was upheld, although no notice had been given to a third person.

This car was seized on 27th December 1945, and the order of forfeiture was not made until 18th January 1946. The car was in

the custody of the police during that time, and Mrs. Thomas did not appear to assert her claim then or at the trial.

G. B. Bagwell, for the accused, respondent: The only evidence as to Mrs. Thomas's knowledge was that she did not know of the use to which the car was to be put. The statute says the magistrate "may" order forfeiture. This means that he has a discretion, and he cannot exercise that discretion without hearing evidence.

The decision appealed from is within the law as laid down in *Rex v. Standard Finance Corporation Limited*, 43 Man. R. 110, 63 C.C.C. 141, [1935] 1 W.W.R. 189, [1935] 2 D.L.R. 176; *In re Prohibition Act and Tosey*, 29 B.C.R. 438, 35 C.C.C. 12, [1921] 1 W.W.R. 669, 57 D.L.R. 340; *Rex v. Howlett*, 39 Man. R. 206, [1930] 3 W.W.R. 452, 54 C.C.C. 386; *Re Kirkham and Rex (Re Rex v. Snyder)*, [1930] 2 W.W.R. 10, 54 C.C.C. 149; *Rex v. Burke* (1924), 44 C.C.C. 205.

W. B. Common, K.C., in reply: There is an adequate remedy under s. 131 of the Act.

Cur. adv. vult.

1st May 1946. The judgment of the Court was delivered by

HOPE J.A.:—This is an appeal by the informant, pursuant to the certificate of the Attorney-General of the Province, from the judgment or order of His Honour Judge A. B. Currey, dated the 1st March 1946, which allowed the appeal of the respondent by varying his conviction and allowing his appeal to the extent that the confiscation of the car ordered by the police magistrate in his order of conviction dated the 18th January 1946, was set aside, and it was ordered that the car be returned forthwith to one Kathleen Thomas, the alleged owner thereof.

The respondent was prosecuted and convicted under The Liquor Control Act, R.S.O. 1937, c. 294, on a charge of having in his possession intoxicating liquor which had not been had or acquired by him under his individual permit or otherwise under the provisions of The Liquor Control Act, and was fined the sum of \$200, or in default of payment to be imprisoned for a term of three months. In the conviction order the magistrate further declared the automobile seized under s. 130 of the said Act to be forfeited to His Majesty in the right of the Province of Ontario. The appeal from this conviction was taken under s. 156 of The Liquor Control Act.

In support of his appeal, and in compliance with subs. 2 of s. 156, the accused filed his affidavit. While this affidavit complied with the provisions of subs. 15 of the said s. 156, it included two additional paragraphs which are not demanded by subs. 15, which two paragraphs read as follows:

"2. That His Worship, the said J. L. Prentice, Esquire, convicted me on the said charge and sentenced me to pay a fine of Two Hundred Dollars (\$200) and costs, and ordered forfeited and confiscated a 1940 Dodge Sedan, which motor vehicle belonged to one Kathleen Thomas, of the city of Toronto, in the county of York, and which had been borrowed by one Alex. Wilson, a friend of mine, from the said Kathleen Thomas.

"3. That the said Kathleen Thomas had no knowledge of any use to which the said motor vehicle was intended to be put or that I would be driven in the car."

The learned County Judge also permitted to be filed on the appeal an affidavit of the said Kathleen Thomas setting out that she was the registered owner; that she had loaned the car to Alex. Wilson, who boarded with her, and who had transported the accused without her authority, and further that she had been given no notice whatsoever of the seizure of her car, or of the trial, or of any intention on the part of the Crown to ask for confiscation of the car.

The accused appealed against not only his conviction but the forfeiture of the car. The learned County Judge dismissed the appeal against the conviction, but allowed the appeal as to the confiscation and ordered the car to be returned to Kathleen Thomas, giving as his reason:

"... it appears to me that the onus is upon the Crown before requesting an order for confiscation that the actual owner be afforded an opportunity of giving evidence as to whether or not he or she has actual or implied knowledge of the alleged illegal use of the car by the occupants or driver."

Under s. 130 of The Liquor Control Act, the provincial officer making a search, and finding liquor which, in his opinion, is unlawfully kept or had, may forthwith seize not only the liquor but the vehicle, motor car or automobile or conveyance in which it is found, and the justice making the conviction for so having or keeping "may in and by the conviction further declare the vehicle, motor car, automobile . . . or conveyance so seized be forfeited to His Majesty, in the right of the Province."

The record discloses that the motor car in question was seized on the 27th December 1945, and remained in the custody of the police until the day of the conviction by the magistrate, namely, the 18th January 1946, when it was declared forfeited to His Majesty in the right of the Province.

The proceedings and order of forfeiture are in the nature of proceedings leading to, and judgment for, a judgment *in rem*. This has been so held on many occasions. The most recent to which my attention has been drawn was that of my brother Hogg in *Re Rex v. Hallinan et al.*, [1937] O.W.N. 325, 68 C.C.C. 226, [1937] 4 D.L.R. 214.

These matters have also been reviewed and dealt with in a number of cases in other provincial jurisdictions: *vide Rex v. Glenfield*; *Rex v. Stein*; *Rex v. Ambrey*; *Rex v. Hughes*; *Rex v. Wong Chew*, [1934] 3 W.W.R. 465, 62 C.C.C. 334, [1935] 1 D.L.R. 37, a judgment of the Court of Appeal of Alberta; *Rex v. Standard Finance Corporation Limited*, 43 Man. R. 110, 63 C.C.C. 141, [1935] 1 W.W.R. 189, [1935] 2 D.L.R. 76, a judgment of the Court of Appeal of Manitoba; *In re Prohibition Act and Tosey*, 29 B.C.R. 438, 35 C.C.C. 12, [1921] 1 W.W.R. 669, 57 D.L.R. 340, a judgment of the Court of Appeal of British Columbia, which I shall discuss presently; *Re Kirkham and Rex (Re Rex v. Snyder)*, [1930] 2 W.W.R. 10, 54 C.C.C. 149, a judgment of Tweedie J., of the Supreme Court of Alberta.

In *In re Prohibition Act and Tosey*, *supra*, the appeal was from an order of Hunter C.J.B.C., quashing a forfeiture order made under the British Columbia Prohibition Act. The appeal was dismissed by a five-judge Court. The judgment of the Chief Justice of Appeal does not deal with the question here under review, but turns upon another point. Eberts J.A., without written reasons, agreed to the dismissal of the appeal. McPhillips J.A. agreed with the dismissal of the appeal and in his reasons stated thus:

"It is a monstrous thing that this automobile should be declared to be forfeited, when it is apparent that the owner thereof was not even heard in the matter. It is unthinkable that the Legislature ever intended that the legislation should be so construed. It has been said that the Courts are the last bulwark of the people, and in my opinion it is rightly said, and unless the

Courts are confronted with not only apt, but intractable words, there can be no forfeiture of property, even where there is jurisdiction to adjudicate, save upon notice and with opportunity to the owner of the property to be heard, otherwise there is the denial of natural justice."

Galliher J.A. and Martin J.A., the latter without written reasons, dissented from the majority judgment and would have allowed the appeal. In his reasons for judgment Galliher J.A. stated:

"The only objection raised here is that the magistrate should have given notice to the owner of the automobile, in order that he might be heard, before declaring the same forfeited. The learned Chief Justice, from whose order this appeal is taken, gave effect to this objection. With great respect, I take a different view. It seems to me the section lays down the proof necessary to enable the magistrate to exercise his discretion, and while, in a case where the car was not the property of the man in whose custody it was found, it might seem desirable that the owner, if known, should be notified, yet the car becomes liable to confiscation so soon as proof of the illegal use to which it is put is established, in my opinion, irrespective of who the owner may be."

The law with respect to judgments *in rem* was authoritatively discussed in the judgment of Sedgewick J. in *Sleeth v. Hurlbert* (1896), 25 S.C.R. 620 at 630, 3 C.C.C. 197, from which I quote the following:

"It is a harsh doctrine—a doctrine that may be used to the unjust destruction of individual rights and interests, the jurisprudence as to the universally binding efficacy of judgments *in rem*; but it is a doctrine too firmly established to be successfully impugned. But what is its extent? A judgment *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication. (See cases cited in *The Duchess of Kingston's case* (1779), 2 Sm. L.C. 9 ed. p. 812). It is true that in the present case, the Supreme Court set aside or quashed the

search warrant, but it did not pass upon or adjudicate the question whether the liquors seized had or had not become forfeited to the Crown. By virtue of its general common law jurisdiction to revise and supervise the proceedings of all inferior tribunals within the province with the view of preventing any from acting in excess of its statutory or other power, it may by *certiorari* bring such proceedings before it, examine upon their legality, and determine accordingly. It therefore, had a right to examine and adjudicate upon the sufficiency of the warrant in question. It had authority to say whether it was valid or invalid on its face, whether all preliminary steps had been taken justifying its issue; whether in short upon grounds apparent from reading it, or upon grounds determined by evidence, it was in law a valid instrument; but that is an altogether different thing from its right to adjudicate upon the 'status' of the property in reference to which the warrant was issued. It has not either by common law or statute the right to adjudicate upon that question. For that purpose Parliament has provided the requisite tribunal and when that tribunal has passed upon it its judgment may be binding upon the world as a judgment *in rem*, subject to the review of the statutory appeal court, but so far as I can see the Supreme Court has not been vested with any right to adjudicate upon the property right, and therefore its judgment as to the legality of process cannot be viewed as a judgment determining status, but only as adjudicating on the legality of procedure."

In *McNeil v. McGillivray et al.* (1907), 42 N.S.R. 133, 4 E.L.R. 187, the Nova Scotia Court of Appeal dealt, *inter alia*, with the question of judgments *in rem*, and the question of notice to the alleged owner of liquor seized under The Canada Temperance Act. In this case *Sleeth v. Hurlbert* was cited as authority. At pp. 139 *et seq.*, Meagher J. states;

"There were two proceedings before the stipendiary; one against the person of Mullins and one against the goods. They were essentially distinct, both as to method and result. One was to secure the punishment of the offender against the law, the other to obtain the forfeiture and destruction of the goods in respect to which the offence was committed, and thus prevent their further use in violation of the law.

"The latter was a proceeding *in rem*, of which all the world at its peril must take notice that condemnation of the things seized

is sought, be it to bring about a forfeiture thereof, or merely to adjudge it to be liable to satisfy the claim or lien sought to be enforced.

"The rule is that in proceedings *in rem* all parties having an interest may intervene to assert their rights even though not specially cited. In contemplation of law all parties, the owner as well as the custodian, and those having liens upon the subject matter, are before the Court, though often in fact they have no knowledge of the proceedings. There are in the eye of the law no strangers to a proceeding *in rem*. Actual notice is not necessary; the seizure of the 'guilty' or 'noxious thing', in a case like the present, is the equivalent of an arrest of the person, and thus jurisdiction to proceed to final judgment is conferred wherever the Court possesses the power to seize and condemn. *The Mary*, 9 Cranch 145."

And at p. 142, Meagher J. proceeds: "The question before the stipendiary was not whose property it was, but was it the 'guilty thing'; was it the property in respect to which the offence was committed; had it been kept for sale, and was it therefore liable to forfeiture and destruction? If it was McNeil's property he was interested in averting its condemnation, when the goods were put upon trial, by showing that these goods, or part of them, were innocent goods.

"It would not help his case to show merely that he had not kept them for sale, nor authorized anyone else to do so, but in fact had forbidden such use of them. He must show, and could only show, they had not offended in the hands of anyone."

And at p. 144: "The statute, it is true, is silent as to who may appear and be heard upon the enquiry as to goods. But parliament knew when enacting it that it was creating a proceeding strictly *in rem*, and did so presumably intending not only that all the consequences incident to that mode of procedure should flow from it, but also that all the rights attaching to proceedings of that character should exist and be applicable. The injustice of any other view is too apparent to require being pointed out. One of the rights incident to proceedings *in rem*, is the right of all persons interested in the subject matter to be heard. The seizure of the 'offending thing' or alleged 'offending thing' was intended by the statute to take the place of service, and to be notice to all parties. That view has been acted upon

again and again in courts where proceedings *in rem* were authorized."

Thus, with all respect to the learned County Judge, and to the forceful expression of opinion of McPhillips J.A. in *In re Prohibition Act and Tosey, supra*, I am of opinion that no notice was necessary to Kathleen Thomas, the alleged owner of the car. The fact that the car was under seizure and in the hands of the police from the 27th December to the 18th January must, in itself, be construed as constructive notice to the owner thereof.

It may well be that it may appear to be "monstrous" that a person should be deprived of his property without notice, yet on the other hand it may be a necessary concomitant to prohibitory or liquor control legislation that such be the case.

By s. 131 of The Liquor Control Act, a motor car, in the circumstances present in this case, could be immediately impounded by the police officer, and even without an order of a convicting magistrate the same would be forfeited to His Majesty in the right of the Province after the expiry of thirty days from the date of seizure, if no person, by notice in writing filed with the Board, claimed to be the owner of such motor car.

By subs. 4 of s. 131 the onus of proving ownership is placed upon the claimant.

With this and other provisions of the Act in mind, I think it must be taken that the Legislature fully appreciated the nature of proceedings *in rem* and intended that forfeiture should be effected without notice to the alleged owner of any motor car.

I am of opinion that the learned County Judge erred in this regard.

By s. 156(12) of The Liquor Control Act, the appeal shall be heard and determined upon the evidence and proceedings had and taken before the justice, plus the affidavit of *bona fides* of the person convicted. The accused did not give evidence before the magistrate, and should not be permitted to include in his affidavit of *bona fides*, which is required by the statute as a condition precedent to the hearing of the appeal, evidence in addition to that which was heard by the magistrate, nor should the learned County Judge have received the affidavit of the alleged owner of the motor car, Kathleen Thomas. The appeal is a statutory one and must comply with the provisions of the statute.

The statute, by s. 156(16), provides specifically that no appeal other than the appeal provided in s. 156 shall be taken against any conviction or any order made by a justice under any of the provisions of the Act. I feel, therefore, that the learned County Judge erred in exceeding the limited provisions for appeal provided by the statute.

This appeal should therefore be allowed, but, in the circumstances, without costs.

Appeal allowed without costs.

Solicitor for the informant, appellant: W. B. Common, Toronto.

Solicitors for the accused, respondent: Roebuck, Bagwell, McFarlane and Walkinshaw, Toronto.

[COURT OF APPEAL.]

Rex v. Harris.

Evidence—Confessions and Admissions by Accused Persons—Evidentiary Value—Proper Charge to Jury—Whether Voluntary.

Where a statement by an accused person is put in evidence as part of the case for the prosecution, it becomes evidence for the accused as well as against him, and the jury is entitled to consider those portions of it which are exculpatory in their nature, and to believe or disbelieve them, like any other piece of evidence. It is error for the trial judge to tell the jury that they may consider the exculpatory parts of the statement only in so far as they explain some other parts which are prejudicial to the accused. *Rex v. Hughes et al.*, [1942] S.C.R. 517; *Rex v. Higgins* (1829), 3 C. & P. 603; *Rex v. Jones and Jones* (1827), 2 C. & P. 629, applied; *Rex v. Jackson*, [1933] O.R. 522, discussed.

AN APPEAL by an accused from his conviction for murder by McRuer C.J.H.C. and a jury.

29th and 30th April 1946. The appeal was heard by ROBERTSON C.J.O. and HENDERSON, LAIDLAW, ROACH and HOGG JJ.A.

C. L. Dubin, for the accused, appellant: 1. The jury was misdirected as to the evidentiary value of the statements of the accused, put in as part of the Crown's case. It is true that what the accused says in such a statement is not evidence unless the Crown makes it so, but once the statement is put in, the whole of it, whether inculpatory or exculpatory, is evidence in the case, either for or against the accused: *Rex v. Hughes et al.*, [1942] S.C.R. 517, 78 C.C.C. 257, [1943] 1 D.L.R. 1, *per* Duff C.J.C., quoting *Rex v. Higgins* (1829), 3 C. & P. 603, 172 E.R. 565, and in the Court of Appeal, 57 B.C.R. 521, 78 C.C.C. 1 at 8, [1942] 3 W.W.R. 1, [1942] 3 D.L.R. 391, *per* Sloan J.A.: *Eberts v. The King* (1912), 47 S.C.R. 1, 20 C.C.C. 273, 3 W.W.R. 37, 7 D.L.R. 538, *per* Duff J.; *Rex v. Krawchuk*, 75 C.C.C. 219 at 220, [1941] 2 D.L.R. 353.

The trial judge relied on *Rex v. Jackson*, [1933] O.R. 522, 60 C.C.C. 52, but the cases there cited do not support the proposition laid down. *Rex v. Higgins*, *supra*, was used in the *Hughes* case to support exactly the opposite conclusion. *Rex v. Steptoe* (1830), 4 C. & P. 397, 172 E.R. 756, and *Rex v. Clewes* (1830), 4 C. & P. 221, 172 E.R. 678, merely say that an accused's exculpatory statement is only evidence, and is not necessarily conclusive. *Rex v. Jones and Jones* (1827), 2 C. & P. 629, 172 E.R. 285, is to the same effect. [HENDERSON J.A.: The trial judge told the jury to read the whole statement and consider it carefully.] But only subject to the limitations laid down in his charge. He

should have drawn the jury's attention, for example, to the explanation, in the statement, of the cut on the accused's face: *Rex v. Stone* (1910), 6 Cr. App. R. 89 at 96, and to any inferences favourable to the accused which might be drawn from the statement: *Rex v. Gray* (1911), 6 Cr. App. R. 242.

2. The statements should not have been admitted in evidence. The accused was arrested on a Saturday, at which time he was helplessly intoxicated. He was questioned, without any warning, on the Sunday, when he was still under the influence of liquor. Although his answers at that time were not tendered in evidence at the trial, it was on the basis of the information he then gave that he was questioned, after a warning, on the following day. The ordinary warning, in those circumstances, was insufficient, and the accused should have been told further that what he had said on the Sunday could not be given in evidence at his trial: *Rex v. Kong* (1914), 20 B.C.R. 71, 24 C.C.C. 142, followed by this Court in *Rex v. Jensen* (1934), unreported. *Gach v. The King*, [1943] S.C.R. 250, 79 C.C.C. 221, [1943] 2 D.L.R. 417, lays it down definitely that statements made by a person in custody in answer to questions put by the police may not be given in evidence unless it is proved that a warning was given.

Apart from the warning, the whole questioning of the accused, in the circumstances, was improper. He was in custody, and the questions were asked solely for the purpose of obtaining admissions which could be used at the trial. The *Gach* case is authority for the proposition that the police had no right to put such questions at all. In that case *Taschereau J.* cites with approval *Lewis v. Harris* (1913), 24 Cox C.C. 66, and *Rex v. Crowe and Myerscough* (1917), 81 J.P. 288. The question, for example, as to having two packages of cigarette papers was virtually cross-examination, and wholly improper: *Rex v. Winkel et al.* (1911), 76 J.P. 191.

3. The trial judge told the jury that in considering whether the circumstances were consistent with any rational conclusion other than that of the accused's guilt, they were to consider all "suggested explanations". This limited them to considering such explanations as had been suggested by counsel for the defence, whereas they were entitled to consider any rational explanation, whether suggested to them by someone else or not. [ROBERTSON C.J.O.: The trial judge does not say suggested by anyone else,

but leaves it open to the jury to consider anything suggested by themselves, or by the evidence.] I submit that it was not made clear to them.

4. The trial judge incorrectly charged the jury as to the defence of drunkenness, as applied to s. 260 of The Criminal Code, R.S.C. 1927, c. 36. He told them that if the accused was too drunk to form an intent to commit rape they might convict him of manslaughter only. But under s. 260, where death results from rape, it must be shown that the accused meant either to inflict grievous bodily harm to facilitate the commission of the offence, or that he wilfully stopped the breath of the deceased, and the jury's attention should have been directed to these intents in connection with drunkenness. The trial judge's charge followed *Director of Public Prosecutions v. Beard*, [1920] A.C. 479, but the English law in this respect is different from s. 260: *Rex v. Hughes et al.*, *supra*, at p. 265 (78 C.C.C.).

5. The trial judge told the jury that the law would presume that a man intended the natural consequences of his act, and thus in effect withdrew the question of intent from their consideration, except in connection with drunkenness. The law will not presume, in such facts as these, that an accused intended to kill. The effect of this direction is that s. 259 is completely withdrawn from the jury's consideration. They were not even told that the presumption was rebuttable.

6. The trial judge permitted the Crown to call more than five professional or expert witnesses, in violation of s. 7 of The Canada Evidence Act, R.S.C. 1927, c. 59. [ROBERTSON C.J.O.: Did the first professional witness, Dr. Maclean, give any evidence that could not have been given by any person of ordinary intelligence? It is difficult to see how special training played any part in his evidence.] That is not the test. He was "entitled according to the law or practice to give opinion evidence". [ROBERTSON C.J.O.: A literal reading of s. 7 would lead to absurd results.] Dr. Maclean did in fact state his opinion as to the cause of death. [ROBERTSON C.J.O.: He said the woman had obviously been strangled, but that opinion was based only upon what anyone could see.]

The trial judge was apparently of the opinion that because Dr. Robinson, the pathologist, stated the results of the autopsy which he performed, as facts, rather than as expressions of his opinion, he was not giving expert evidence. This is not the law:

Rex v. Barrs, [1946] 1 W.W.R. 328 at 338. It makes no difference that the earlier expert witnesses did not give any evidence which was particularly damaging to the accused. [ROBERTSON C.J.O.: Even if you are right, can we not act as is done in similar circumstances in civil appeals, if we are of the opinion that this was not a substantial wrong to the accused?] In a capital case, every protection to which the accused is entitled must be given to him.

7. The trial judge permitted the giving of evidence which was not relevant to the issues, but was of such a nature as to show that the accused was a person of bad character, and likely to commit a crime. This is contrary to the law as laid down in *Rex v. MacDonald*, [1939] O.R. 606 at 623, 72 C.C.C. 182, [1939] 4 D.L.R. 60.

8. During the trial one of the jurors became ill, and he was attended by Dr. Cuddy, the coroner, who had already given evidence for the Crown, and was later recalled to give further important evidence. This should not have been done. [ROBERTSON C.J.O.: No objection was made to the trial proceeding.] It does not appear whether counsel for the defence was aware of these facts. [ROBERTSON C.J.O.: You do not suggest that there is any foundation for saying that anything improper did in fact take place?] No.

9. The trial judge failed to present the case for the defence adequately to the jury, or to direct the jury's attention to circumstances favourable to the accused. His duty in this respect has been laid down in *Rex v. West* (1925), 57 O.L.R. 446, 44 C.C.C. 109 at 112, where the earlier decisions are summarized. The duty is even greater where, as here, defence counsel is inexperienced. There were several circumstances which might have told in favour of the accused, and the jury's attention should have been drawn to these: *Markadonis v. The King*, [1935] S.C.R. 657, 64 C.C.C. 41, [1935] 3 D.L.R. 424, *per* Cannon J.

10. The jury were directed that if they had any reasonable doubt they "should" acquit the accused. They should have been told that they "must" acquit him. The direction given left them with a discretion: *Rex v. Costello*, [1932] O.R. 213, 58 C.C.C. 3 at 15, [1932] 2 D.L.R. 410. [ROACH J.A.: Surely telling them that they "should" is equivalent to telling them that it is their duty.]

C. L. Snyder, K.C., Deputy Attorney-General, for the Crown, respondent: On the whole case, there has been no substantial wrong or miscarriage, and the appeal should be dismissed under s. 1014(2). Dealing with the appellant's arguments in order:

1 and 2. The trial judge used the exact words of the judgment of this Court in *Rex v. Jackson*, [1933] O.R. 522, 60 C.C.C. 52 at 54. See also Wigmore on Evidence, 3rd ed. 1940, Vol. III, p. 345, para. 861. These documents have been referred to as confessions, but they were not so in fact, and Wigmore, *op. cit.*, para. 821, says that exculpatory statements are not subject to the rules as to the admissibility of confessions. There is no doubt that the trial judge had in mind the correct view as to his functions in respect of these statements, and he applied the correct principles in admitting them in evidence.

It is questionable whether it would have been proper for the police to tell the accused that his first statement could not be used in evidence, as this would have been a usurpation of the functions of the trial judge.

3. The direction here was adequate, and was in compliance with the rule in *Hodge's Case* (1838), 2 Lew. C.C. 227, 168 E.R. 1136. The trial judge first gave the technical direction, and then enlarged upon it in more popular and understandable language. The words "all explanations suggested" mean "suggested by the evidence", and cover anything that might occur to any jurymen during the cross-examination of the witnesses by defence counsel, or at any other time.

4 and 5. The jury must have had in mind, when listening to the trial judge, just what the accused's condition was. The charge is based word for word upon well-established principles. The *Hughes* case, *supra*, was on an entirely different set of facts.

6. Dr. Maclean was not an expert witness, giving opinion evidence, nor was Dr. Robinson, the pathologist. [ROBERTSON C.J.O.: A doctor who performs an autopsy, and is then called to tell what he found, and describes the condition of various organs, *e.g.*, by saying that the heart was normal, is surely an expert. It need not be "opinion" evidence, in the sense that it is utterly divorced from facts.] The Crown did not call Dr. Maclean as an expert witness, or examine him as a professional person entitled to give opinion evidence.

7. The evidence referred to was not objectionable, and could not have affected the result.

8. It has been the practice in this Province that when a juror or witness becomes ill, the physician who is called in is the senior coroner for the district. The defence counsel did not want the jury discharged. [ROACH J.A.: But did he know that Dr. Cuddy had attended the juror?] I cannot say.

9. The "theory of the defence" in this case can be found only in the judge's charge to the jury, and was fully and fairly put to them.

10. Ordinarily a jury, on being told by the trial judge that they "should" do something, will take that as a direction that it is their duty to do so.

In the final analysis, and even if there were some defects in the trial, there was no substantial wrong or miscarriage of justice, and the appeal should be dismissed: *Schmidt v. The King*, [1945] S.C.R. 438 at 440, 83 C.C.C. 207, [1945] 2 D.L.R. 598.

C. L. Dubin, in reply: The Court cannot possibly say in this case that there has been no substantial wrong or miscarriage: *R. v. Macdonald*, [1939] O.R. 606 at 624-5, 72 C.C.C. 182, [1939] 4 D.L.R. 60; *Brooks v. The King*, [1927] S.C.R. 633 at 636, 48 C.C.C. 333, [1928] 1 D.L.R. 268; *Makin v. The Attorney-General for New South Wales*, [1894] A.C. 57; *Rex v. MacDonald*, [1945] O.W.N. 430, 84 C.C.C. 177 at 194, [1945] 3 D.L.R. 764.

Cur. adv. vult.

6th May 1946. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the conviction of the appellant on 7th March 1946, on his trial before the Chief Justice of the High Court, with a jury, at Whitby, on the charge of murdering one Mrs. Audrey Lyons on the 10th November 1945.

Mrs. Audrey Lyons lived in a small house on Oak Street, in the village of Ajax, with her two small children. Her husband was absent—whether on war service or on other service is not stated. On the 10th November 1945 some of her neighbours, whose attention had been attracted by the absence of anyone about the Lyons' premises during the forenoon, investigated and found the two small children alone in their bedroom and needing attention,

and then discovered the dead body of Mrs. Lyons lying on the floor of her own bedroom. A doctor was called, and, in due course, the coroner and the police were brought in, and they carried on an investigation that led to the arrest of the appellant and to the charge of murder, on which he was later tried.

It is not in dispute that the appellant, in company with others, had spent some hours in the company of Mrs. Lyons at the Lyons' home, on the night of 9th November 1945, and had remained there into the early hours of 10th November. He then left in the company of two young fellows, Carl Linton, aged 17, and his older brother, Donald. They parted company at the corner, not far from the Lyons' house, the Linton boys taking one route and the appellant another. There is evidence that the Linton boys reached home at approximately three o'clock in the morning, and there is evidence that the appellant, who had not much farther to go, did not reach his boarding-house until after four o'clock.

Mrs. Lyons' death was caused by strangulation. The upper part of a pair of her pyjamas had been tied tightly about her neck and knotted. The bedroom, where she was found, was in some disorder. She was partially disrobed and some of her garments were torn. Some man had had intercourse with her, but whether it was voluntary on her part or forced, and whether before or after strangulation, the doctors could not determine from an examination of her person. She had been dead for some hours when her body was discovered.

The women who found her were able to get into the house without breaking in, and there is no evidence to suggest that others could not have done the same before them. There were also periods of time after the first discovery of the death, and before the police placed a guard upon the premises, when it might have been possible for some one to enter the house without being seen. Special significance is attached to this by the defence because an important piece of evidence, upon which the prosecution relies as connecting the appellant with the crime, was not seen by any of the witnesses until some hours after the discovery of the body. This was a package of cigarette papers among the folds of the upper garments of the deceased. It bore the name of the appellant, and a handwriting expert, after a study of appellant's signature, said that in his considered opinion the name on the carton was very probably in the handwriting of the appellant.

As we are directing a new trial it is not advisable to enter upon a minute discussion of the evidence. It is, I think, proper to say that there was evidence that, if believed, would support the verdict of the jury. The evidence is, however, largely circumstantial, and on a new trial certain parts of it may be given a quite different aspect when viewed as part of the entire picture that may then be presented. Comment upon the possibilities at the present time should be reserved.

In the course of the case for the Crown certain statements made to the police by the appellant were put in evidence by prosecuting counsel. In my opinion the learned Chief Justice was right in his ruling that they were voluntary statements such as were admissible in evidence against the accused. In charging the jury the Chief Justice directed them in regard particularly to one of these statements, which consists of eighteen pages of questions put to the appellant by the police officer, and his answers, as follows:

"In regard to this statement, I want to tell you what the law is in respect to its evidentiary value. In so far as there are any statements in it that are prejudicial to the interest of the accused, it is good evidence; it is evidence against him. But I want to say further, the prisoner's account in the statement of circumstances explanatory of his conduct is not evidence of the truth of such account, but it is evidence that should be considered in determining the real meaning of anything that is in the statement that may be prejudicial to the accused. Where, as here, the Crown puts in as evidence against the prisoner a written statement made by him, part of which may be incriminatory and part exculpatory, it becomes the duty of the jury to ascertain the true meaning of any admissions which on their face are unfavourable to the accused. To be in a position to do so, those parts of the statement which are explanatory of such adverse admissions must for such limited purpose be admitted in evidence, although the jury may on sufficient grounds, as in the case of other evidence, believe or disbelieve them. So you may believe such part of this statement as you care to; you may disbelieve other parts. In so far as any of it may explain anything that may be prejudicial to the accused, you may examine it and see how far it is explanatory."

These observations of the learned Chief Justice were based upon the judgment of this Court in the case of *Rex v. Jackson*, [1933] O.R. 522, 60 C.C.C. 52. Whether or not all the dicta contained in that judgment were necessary to the decision that was made in the case, or are fully supported by the authorities referred to in the judgment, may be matters for difference of opinion. There is, however, a later decision of the Supreme Court of Canada in *Rex v. Hughes et al.*, [1942] S.C.R. 517, 78 C.C.C. 257, [1943] 1 D.L.R. 1, by which we are bound, and which is plainly in conflict with the directions given by the Chief Justice to the jury in the present case. The judgment of the Supreme Court of Canada in the *Hughes* case was delivered by the Chief Justice of Canada. He quoted what Parke J. had said in the case of *Rex v. Higgins* (1829), 3 C. & P. 603 at 604, 172 E.R. 565, as follows:

"Now, what a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as a part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you believe it."

The facts of the *Hughes* case made it clearly a case for applying the principle quoted by Duff C.J. from the *Higgins* case, if that principle is sound. The charge was murder by shooting one of the occupants of premises that the accused had invaded for the purpose of robbery. There was no doubt, upon the evidence of eye-witnesses of the occurrence, that death was caused by a shot from a revolver in the hands of the accused Hughes. While there was evidence that, unquestionably and without recourse to any statement of the accused, would warrant the jury in finding the charge of murder proved, there was other evidence to be found in a statement of the accused Hughes, put in by the Crown as part of its case, that, in the opinion of the Supreme Court of Canada (in this agreeing with the opinion of the Court of Appeal for British Columbia, 57 B.C.R. 521, 78 C.C.C. 1, [1942] 3 W.W.R. 1, [1942] 3 D.L.R. 391) might have warranted the jury in bringing in a verdict of manslaughter. The Crown adduced in evidence against the accused the testimony of one Ciminelli, who deposed to an account of the shooting given to him by the accused in a conversation. On cross-examination Cimi-

nelli said that on the preliminary hearing he had given the following version of the conversation:

"Q. What was the conversation? A. He told me that he was in a jam.

"Q. What kind of a jam? A. He told me he took some store, and the guy came for him, and struggled with him, and the gun accidentally went off.

"Q. Do you remember giving that evidence? A. That is right.

"Q. Your recollection was clearer then that it is to-day, I take it? A. That is right."

Commenting upon this, Duff C.J. proceeded, (after citing the passage I have quoted from Parke J. in *Rex v. Higgins*): "If the jury accepted Ciminelli's version of Hughes' statement given at the preliminary hearing ('that the gun accidentally went off') as a true account of that statement, then that statement in its complete form was evidence in favour of the accused." The learned Chief Justice treated the exculpatory statement of Hughes, that "the gun accidentally went off", not as merely explanatory of anything prejudicial to him to be found in his statement taken as a whole. He plainly considered that it was open to the jury to accept Hughes' statement that "the gun accidentally went off" as evidence that the pistol in fact went off by accident, and not by the voluntary act of Hughes.

The principle as stated in the *Hughes* case by Duff C.J. is supported by a number of older cases, and by texts of recognized authority. In Roscoe's Criminal Evidence, 11th ed. 1928, at p. 52, the judgment of Bosanquet Serjt. in *Rex v. Jones and Jones* (1827), 2 C. & P. 629, 172 E.R. 285, is quoted. There was a charge of the wilful murder of a new-born child. There was evidence of finding cuts across the throat of the child, which surgeons were of the opinion must have been inflicted while the child was alive. There was a confession by one of the two accused that she had cut the child's throat. There was evidence by other witnesses for the prosecution that the same person had told them that the child was stillborn. Counsel for the prisoners submitted that, the Crown having put in the latter evidence, there should be an acquittal. The learned Serjeant left the whole of the evidence to the jury, giving the following reasons:

“There is no doubt that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so; and then the statement of the prisoner, and the whole of the other evidence, must be left to the Jury, for their consideration, precisely as in any other case, where one part of the evidence is contradictory to another.”

In Russell on Crimes, 8th ed. 1923, it is said at p. 2050, where numerous cases are cited:

“The whole of the prisoner’s statement must be taken into consideration by the jury, who are not bound to take what he has said in his favour to be true, because it is given in evidence by the prosecutor; but are to weigh it, with all the circumstances of the case, and determine whether they believe it or not. The jury may, therefore, believe one part of the prisoner’s statement and disbelieve another. They may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. In determining whether the statement is true or not, the jury should consider whether it is probable or improbable in itself, and whether it is consistent or inconsistent with the other circumstances of the case. If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor improbable in itself, it will naturally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury, precisely as in any other case, where one part of the evidence is contradictory to another.”

The statement of the rule in Taylor on Evidence, 12th ed. 1931, pp. 547-548 (ss. 870 and 871) is to the same effect.

The statements of the appellant in evidence here were all put in by the Crown as part of its case. They are not, strictly speaking, confessions, for the appellant did not admit that he

had any part in the slaying of the woman. The statements are in fact what may be considered as admissions in respect of matters having some relation to proof of the appellant's opportunity to commit the crime, or of a possible motive for it, and other matters that do not directly establish his guilt, but are links in the chain of evidence. His admission that he separated from the two Linton boys soon after leaving the deceased's house may be considered as somewhat advancing or supporting the case for the prosecution. There is, however, a statement by him that he caught sight of them again when they had all reached a point much nearer their respective homes. That statement, if believed, would go some distance in lessening the effect of the first-mentioned statement. The interrogation of the appellant by the police officers was, however, so lengthy that it would seem to be a matter quite beyond the capacity of any ordinary jury to separate what were admissions prejudicial to the accused, and what were exculpatory statements, and what perhaps were neither the one nor the other, so that they might know which statements they could accept as statements of fact and which statements they could consider only in so far as they were explanatory of something prejudicial. Many aspects of the case were touched upon by the police in their interrogation of the appellant. A great deal of what they inquired into in their examination of the appellant had little, if anything, to do with the matters in issue at the trial. It probably would have been time well spent if counsel for the Crown had not yielded to the demand of appellant's counsel at the trial that he should put in the whole statement, and had put in only such parts as were really relevant to the issues and were not established by other evidence. The jury should not be left to perform a duty that is not reasonably within their competence.

It was further argued for the appellant on this appeal that the trial judge had not, in his charge, placed the case for the appellant before the jury as fully as the case for the prosecution. That—almost of necessity—followed from the view that the learned Chief Justice took in regard to the evidence afforded for the defence by the statement of the appellant already discussed. It is not very clear from the record precisely what the theories of the defence were, and for that nothing can be charged against the learned Chief Justice, who endeavoured most

patiently to clarify the position of the defence. There were some matters, however, quite outside the statement made by the appellant to the police that might well have called for comment in the charge, from the appellant's point of view.

A great deal of importance was properly attached to the circumstance of the package of cigarette papers, bearing the appellant's name, being found with the body of the deceased woman. There was evidence, however, particularly that of Dr. Maclean, that the body when he examined it, when called in by the women who discovered it, was not in the same position as it was in when seen by the police and the coroner on their arrival. There was an interval when no one kept watch in the premises. The learned Chief Justice was inclined to regard Dr. Maclean as a mistaken witness, whose powers of observation and recollection were not very good. That, however, was a matter that might well have been left for the jury to pass upon. The evidence also discloses that there were a number of persons who had access to the room where the body lay, before the discovery of the package of cigarette papers, which was not for some hours after the neighbours had discovered the tragedy. These matters were not dealt with in the charge as matters of any considerable importance.

Then there was the incident of a car pulling up in front of the Lyons home late in the night, at a time when Mrs. Lyons and others of the party were coming from a neighbour's house back to hers. There is no evidence as to the identity of the person or persons in the car, and on young Linton approaching to ask the driver what he wanted, the car pulled away. In a case depending wholly upon circumstantial evidence, and where there are not many circumstances connecting the accused with the crime, the jury ought to be invited to consider the possible significance of all the circumstances in evidence before coming to a conclusion. The prosecution has not only the duty to establish circumstances consistent with guilt, but must exclude all other reasonable possibilities. No doubt, counsel for the Crown proved all that he could prove with respect to this motor car, but the question whether the evidence is sufficient to exclude all other reasonable possibilities is for the jury. This motor car having been brought into the picture, and the circumstances

being unusual and not remote in time from the offence, it would have been well if the jury's attention had been directed to it.

Numerous other grounds of appeal, which I have not mentioned, were taken and were pressed upon us, but it is not necessary that we should deal with any but the two that I have already discussed. Upon the grounds, therefore, of misdirection in respect of the use that the jury could properly make of the statements of the appellant that were put in evidence by the prosecution, and misdirection or non-direction with respect to the theories of, or the case for, the defence, we have allowed the appeal and have set aside the conviction and have ordered a new trial.

New trial ordered.

Solicitors for the accused, appellant: Kimber and Dubin, Toronto.

Solicitor for the Crown, respondent: C. L. Snyder, Toronto.

[BARLOW J.]

Re Nathanson.

Executors and Administrators—Duties—Trust Funds Provided for by Will—Payment of Interest before Funds Set up—Rate of Interest payable.

Where a testator directs his trustees to set up trust funds, paying the income thereon to certain persons for life, with remainder over, the life tenants of the trust funds are entitled, until the funds are actually set up, to receive interest on the amounts designated, and this interest, unlike that payable on a legacy, is payable from the date of death. *Re Scadding* (1902), 4 O.L.R. 632; *Re Murton* (1924), 26 O.W.N. 325; *Re Crothers* (1922), 22 O.W.N. 400, applied.

In determining the amount of such interest, the Court should be guided by what the trust funds, if invested in accordance with the terms of the will as to investment, would probably earn. Under present conditions, it should be computed at a rate of 4 per cent.

The fact that the trust funds have not been set up does not entitle the persons entitled to the income from the trust funds to receive a proportionate part of the income actually received by the trustees, unless there is a clear provision in the will to that effect. A mere permission to the trustees to retain investments, if it is clearly inserted only for purposes of administration of the estate, will not have this effect. *In re Chaytor*; *Chaytor v. Horn*, [1905] 1 Ch. 233, applied; *In re Inman*; *Inman v. Inman*, [1915] 1 Ch. 187, distinguished; *In re Thomas*; *Wood v. Thomas*, [1891] 3 Ch. 482, referred to.

Where a testator directed that one-quarter of the residue of his estate should be given to his widow, and that the income on the other three-quarters should be paid to life tenants, with remainder over, *held*, the life tenants of the three-quarters were entitled to receive the equivalent of 4 per cent. interest on their shares until such time as the residue was invested in accordance with the terms of the will as to investment, and the balance of the income from the residue should be capitalized, 4 per cent. on such capitalized income also to be paid to the life tenants. The widow, however, was not entitled to anything *qua* income, since one-quarter of the residue was given to her absolutely, and all capitalized income became part of the residue, so that she would benefit when ultimate distribution was made.

A MOTION for the opinion, advice and direction of the Court. The facts, and the questions propounded, are set out in the reasons for judgment.

25th April 1946. The motion was heard by BARLOW J. in Weekly Court at Toronto.

J. J. Robinette, K.C., for the executors.

K. V. Stratton, K.C., for the son of the deceased.

W. J. Beaton, K.C., and *J. L. Pond*, for the widow.

R. I. Ferguson, K.C., for the daughter.

P. D. Wilson, K.C., Official Guardian, for infants and unborn children.

16th May 1946. BARLOW J.:—An application by the trustees for the opinion, direction and advice of the Court as to certain

questions respecting the management and administration of the estate, and respecting the construction of the last will and testament of the deceased.

The deceased died on the 27th May 1943, leaving a widow, one son, and two daughters and two grandchildren. The grandchildren and the youngest child, Johan Irene Nathanson, are infants.

Under the scheme of the will the testator gave his estate to his trustees to sell and convert the same, with power to postpone the conversion in their discretion, and with power to retain any portion of the estate in the form it was in at death, even though not in the form of an authorized investment, for such length of time as they might deem advisable.

The power to sell and convert, to postpone conversion, and to retain investments, are clearly directions given for the administration of the estate.

After a direction as to payment of debts, succession duties and death duties, and a direction as to the disposition to be made of his residence, with neither of which we are concerned upon this application, the testator directs his trustees "to set aside, invest and keep invested the sum of Two hundred and Fifty Thousand Dollars (\$250,000.00) (hereinafter referred to as 'my wife's fund') and to pay the net income thereof to my said wife, Irene Henrietta Nathanson, during the full term of her natural life, and until the said sum is so set aside and invested not longer than one year to pay to my wife out of my general estate interest from the date of my death on so much of the sum of \$250,000.00 as is not invested at the rate of 5% per annum". The testator then provides that on the death of his wife the income from this fund shall go to his children for life, and the capital to his grandchildren.

The testator next directs his trustees "to set aside, invest and keep invested the sum of Five Hundred Thousand Dollars (\$500,000.00) and until the death of my last surviving child to pay and divide the net income therefrom equally between my two daughters". Provision is then made for the child of a deceased daughter to take its parent's share and for payment of the capital ultimately to the grandchildren.

Certain smaller trusts are set up upon which the income is to be paid to the life tenant and the capital distributed at the death of the life tenant. After giving certain specific legacies

with which we are not concerned, the testator directs that the residue of his estate shall be disposed of by the payment of one-quarter thereof to his wife and the balance to his children, with a postponement of the payment of certain portions thereof, but with payment of the income in the meantime.

Para. 13 of the will empowers the trustees "to invest the funds of my estate and the funds from time to time constituting any of the special trusts of funds herein provided to be set up or set aside in securities which are authorized by the laws of England for the investment of trust funds of the funds of insurance companies and/or as are authorized by the Insurance Act of Canada, R.S.C. 1927, Cap. 101, and amendments, for the investment of the funds of insurance companies as well as may from time to time be authorized by the laws of Ontario for the investment of trust funds."

The trustees propound the following questions:

"1. Under paragraph 13 of the last will and testament of Nathan Louis Nathanson, deceased, are the trustees empowered to invest the funds of the estate and the funds of the special trust funds to be set up as provided in the will in the following types of securities:

"(a) Securities which are authorized for the investment of trust funds or the funds of insurance companies by the laws of England in force at the date of the death of the deceased or securities which may, from time to time, be authorized for the investment of trust funds or the funds of insurance companies by the laws of England?

"(b) Securities which are authorized by the laws of England for the investment of the funds of any type of insurance company in England or securities which are authorized by the laws of England for the investment of the funds of life insurance companies?

"(c) Securities in which insurance companies may invest their funds as set out in section 63 of the Canadian and British Insurance Companies' Act, 1932, 22-23 George V, Chapter 46 (Canada)?"

2. After referring to the special trust funds for the widow, for the children and for certain other life tenants, and it appearing that the special trusts have not been set up by the trustees and no securities, as yet, having been appropriated by the trustees to any of the said trusts, and the trustees being in

receipt of income from the assets of the estate, the trustees ask: “. . . are the life tenants of the special trust funds entitled to be paid income from the date of the death of the testator or from one year after the date of the death of the testator?”

“3. Are the life tenants of the said special trust funds entitled to be paid income at the rate of 3% or 4% or 5% on the capital of the respective special trust funds or are they entitled to be paid a proportionate share of the actual income received by the trustees from the assets of the estate until such time as the special trust funds are set up and securities appropriated thereto by the trustees?

“4. Are the life tenants of three quarters of the residuary estate (dealt with in paragraph 3(w) of the will) namely, Paul L. Nathanson, Jean Natalie Levin and Johan Irene Nathanson, entitled to be paid the balance of the actual income received by the trustees from the assets of the estate remaining after payments of income to the life tenants of the special trust funds or should some portion of the balance of the actual income be capitalized and credited to the capital of the residuary estate?

“5. Is the widow Irene Henrietta Nathanson entitled to be paid any portion of the income, and if so what portion of the income, by virtue of the absolute gift to her of one quarter of the residue of the estate contained in paragraph 3(w) of the will?”

The succession duties have not yet been settled, and although the deceased died on the 27th May 1943, and probate was issued on the 29th October 1943, the special trusts have not been set up. In view of the fact that this has not been done, I have had some doubt as to whether I should now proceed to answer the questions asked. I have come to the conclusion, however, that in order to assist the trustees in the administration, and with the warning to the trustees that the special trusts must be set up as soon as possible, the questions should be answered.

I am of opinion that questions 1(a) and 1(b) cannot be answered on the material before me.

The answer to question 1(c) should be “yes”. The Insurance Act, R.S.C. 1927, c. 101, had been repealed when the will

was made, and there had been enacted in its stead 22-23 George V (Dom.), c. 46, being The Canadian and British Insurance Companies Act, 1932. This was clearly the Act intended to be referred to by the testator.

The answer to question 2 will be that the life tenants of the special trust funds are entitled to be paid income from the date of the death of the testator. The law appears to be clear that interest on legacies is payable from the date the legacy becomes payable, and if no date is fixed for payment, then interest becomes payable from one year after the date of death. In the case of a trust fund it is presumed to be earning income from the date of death, and the life tenant is entitled to the income from that date: *Re Scadding* (1902), 4 O.L.R. 632; *Re Murton* (1924), 26 O.W.N. 325; *Re Crothers* (1922), 22 O.W.N. 400.

Question 3 should be answered that the life tenants of the special trust funds are entitled to be paid income at the rate of 4 per cent. on the trust funds until such time as the special trust funds are set up, except in the case of the widow, where the will provides for payment to her of 5 per cent.

In proceeding to fix the rate of interest to be paid as income, the Court approaches the matter from the standpoint of what the trust funds, if invested in accordance with the terms of the will as to investment, are likely to earn. At present Dominion Government bonds yield not more than 3 per cent.; land mortgages, if procurable, do not yield more than 5 per cent. The rate of interest presently payable by the office of the Accountant of the Supreme Court is 3 per cent. It is true that the legal rate of interest is 5 per cent., but this cannot serve as a guide.

After a careful consideration of all these matters, and of what the trusts funds, if invested in securities authorized by the will would earn, I have concluded that I should fix the rate at 4 per cent.

The trust funds not having been set up, I am asked by counsel for certain of the beneficiaries to find that the income presently being received by the trustees should be divided among those entitled to the income from the trust funds. Counsel cited in support of this contention *In re Inman*; *Inman v. Inman*, [1915] 1 Ch. 187.

This case is distinguishable from the case at bar.

In re Inman held that the income from stocks, funds and securities held by the testator at his death was payable to the annuitant. Para. 11 of the will there in question was as follows: "I empower my trustees to permit my personal estate invested at my decease in or upon any stocks, funds or securities whatsoever yielding income to continue in the same state of investment so long as they shall think fit." It was held that this was for the benefit of the tenant for life. I cannot so interpret the will before me.

No reference is made to the holdings of securities yielding income. The right to retain investments in the will before me for interpretation is clearly for the purpose of the administration of the estate and in my opinion clearly falls within the decision of *In re Chaytor; Chaytor v. Horn*, [1905] 1 Ch. 233. I cannot find in the Nathanson will any express or implied gift of the income of securities held pending conversion.

For the above reasons I conclude that the life tenants of the trust funds are entitled to receive interest at 4 per cent., save and except the widow, who by the will receives 5 per cent. See *In re Thomas; Wood v. Thomas*, [1891] 3 Ch. 482 at 486.

The life tenants are, by the will, entitled to the income from the particular trust funds when set up, pursuant to the will until conversion has been made or investments authorized by the will are earmarked or set aside as part of a trust fund. The investments held by the trustee are not part of any trust fund but are items of property retained by the trustees only until they can realize on them.

Question 4 should be answered as follows: The life tenants of the residue are entitled to receive 4 per cent. on three-quarters of the residue from the date of death of the testator until such time as the residue is invested in accordance with the terms of the will as to investment. The balance of the income from the residue should be capitalized and the life tenants are entitled to receive 4 per cent. on three-quarters of such capitalized income. See *Gover on Capital and Income*, 3rd ed. 1933, pp. 176, 181, 183; *Jarman on Wills*, 7th ed. 1930, pp. 1193-4, 1196-8, 1202; *Theobald on Wills*, 9th ed. 1939, p. 453.

Question 5 should be answered as follows: The widow becomes entitled under the will to one-quarter of the residue. The residue includes all capitalized income and the widow thus

benefits when the ultimate distribution is made. She is not, in my opinion, entitled to any income *qua* income at the present time.

An order will go in accordance with the above reasons, together with costs to all parties out of the estate, costs of the trustees on a solicitor and client basis.

Order accordingly.

Solicitors for the trustees, applicants: Lawson, Stratton, Green & Ongley, Toronto.

[COURT OF APPEAL.]

Danluk v. Birkner et al.

Negligence—Duty of Occupier of Dangerous Premises—Person on Premises for Unlawful Purposes—Common Betting House—The Criminal Code, R.S.C. 1927, c. 36, s. 228(1).

The plaintiff went to premises occupied by the defendants, and operated by them (to the plaintiff's knowledge) as a common betting house. An alarm was sounded, and the plaintiff, in attempting to escape, ran through a door which he had never before used. This door led to the outdoors, but there were no steps beyond it. The premises were on the second floor, and the plaintiff fell to the ground and was injured.

Held, the plaintiff could not recover. He was on the premises, not lawfully, but for a criminal purpose, and the defendants owed him no duty that a court of justice would recognize to provide against such an emergency.

Criminal Law—Common Betting Houses—Being “found in”—The Criminal Code, R.S.C. 1927, c. 36, s. 228(1).

Semble, it is not essential, to render a man guilty of the offence of being found in a disorderly house, under s. 228(1) of The Criminal Code, that he should be actually discovered there by the police. It is sufficient if it is shown that he was in fact in the premises without lawful excuse. *Thomas v. Powell* (1893), 57 J.P. 329, referred to.

AN APPEAL by the defendants Martin Birkner and William Cassey from the judgment of LeBel J., [1945] O.W.N. 822.

The following statement of facts is taken from the judgment of ROACH J.A.:

This is an appeal from the judgment delivered by Mr. Justice LeBel dated the 27th day of October 1945, awarding the plaintiff the sum of \$6,500 damages against the defendants Martin Birkner and William Cassey. The facts as found by the trial judge are as follows:

On the afternoon of the 12th August 1944, the plaintiff went to certain premises described as "club rooms" situate on the second floor of a building in the city of Windsor, for the purpose of betting on horse races. The main floor of the said building was occupied as a pool-room and access to the second floor was gained through a door leading from the pool-room to a stairway. That doorway was kept locked, and on the occasion in question the defendant Martin Birkner unlocked the door to permit the plaintiff to go upstairs. The upstairs premises consisted of one room which was given over entirely to the operation of a betting establishment. The defendant Cassey was in immediate charge of those betting operations, receiving from the patrons who frequented the place bets on horses racing at various tracks. When the plaintiff entered the upstairs premises, there were a number of people already there and betting operations were in full swing, with the defendant Cassey behind the counter receiving the bets. It does not appear whether the plaintiff actually made a bet or not. He had been in the premises about half an hour, during part of which time he was engaged in studying a racing form, when an alarm buzzer sounded. The sound of this buzzer indicated to Cassey and the frequenters that the police were in the act of raiding the premises. Cassey grabbed all the betting sheets on the counter and made some effort to dispose of them, together with any other evidence, and the frequenters ran in various directions. The plaintiff saw a doorway leading from the room with the permanent door open and a screen door on the opening, which screen door was hooked. He ran to that door for the purpose of escaping, unhooked the latch and stepped out with his right foot. Discovering at the last moment that there was no stairway, he attempted to save himself from falling to the ground and succeeded in grabbing an iron pipe which ran up from the ground and was attached to the wall, but despite his efforts, he finally fell and was seriously injured.

The plaintiff then brought this action to recover damages for the injuries thus sustained.

22nd March 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

G. A. Martin, K.C., for the defendants, appellants: The plaintiff was not entitled to be considered as an invitee. That

status is given only where the plaintiff is on the defendant's premises by invitation, express or implied, on lawful business: *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 at 285, affirmed (1867), L.R. 2 C.P. 311; *Hillen et al. v. I.C.I. (Alkali), Limited*, [1934] 1 K.B. 455, per Scrutton L.J. (affirmed [1936] A.C. 65). The plaintiff here was on the premises for an unlawful and criminal purpose, and our only duty in these circumstances is not to act recklessly in disregard of his presence: the *Hillen* case, *supra*, at p. 467. This is really an application of the maxim *ex turpi causa non oritur actio*: *Hegarty v. Shine* (1878), 14 Cox C.C. 124, particularly at p. 131. The trial judge, in finding that the plaintiff was an invitee, overlooked the illegal object of his presence in our premises. [LAIDLAW J.A.: One way of putting your argument would be to say that the status of an invitee depends upon the consent of the occupier, and there can be no consent to the plaintiff's going where the law forbids him to be.]

The purpose for which this door was used by the plaintiff, even if he is to be considered an invitee, was outside the scope of the invitation, which extended only to leaving the premises by the usual way: *Hillen et al. v. I.C.I. (Alkali), Limited*, [1936] A.C. 65 at 69; *Walker et al. v. Midland Railway Company* (1886), 55 L.T. 489, 2 T.L.R. 450 at 451; *Connor v. Cornell* (1925), 57 O.L.R. 35; *Walsh v. International Bridge and Terminal Co.* (1918), 44 O.L.R. 117 at 133-5, 45 D.L.R. 701. [LAIDLAW J.A.: You might also refer to *Canadian National Railways Company v. LePage (Lesage)*, [1927] S.C.R. 575, [1927] 3 D.L.R. 1030, 34 C.R.C. 300.]

Even if the plaintiff was an invitee, he did not use reasonable care for his own safety, which is an essential part of the law as laid down by Willes J. in *Indermaur v. Dames*, *supra*. On the evidence, he had not seen a stairway on the outside for a considerable length of time, and he did not look before stepping through the door. There are cases where it has been said that a person is entitled to assume that a stairway or ladder is in the same position and condition as when he last saw it, *e.g.*, *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74, but those cases are inapplicable here. [LAIDLAW J.A.: There is no doubt that the plaintiff knew that this door led to the outside, and that he did not look. Can he excuse himself by

saying that he was in a panic because of the coming of the police?] No, that is not an excuse.

As to "concealed" and "obvious" dangers, and "reasonable care", I refer to the *Fairman* case, *supra*, at p. 96.

Joseph Sedgwick, K.C., for the plaintiff, respondent: It is clear from the evidence that Birkner, when he removed the stairs from outside this door, was aware of the dangerous nature of the door, and that it constituted a trap. It therefore makes no difference whether the plaintiff was an invitee or a mere licensee.

It has been assumed throughout that the plaintiff and the defendants were "partners in crime". But the position of a mere frequenter of a disorderly house is very different from that of a keeper. The former commits an offence, under s. 228(1) of The Criminal Code, R.S.C. 1927, c. 36, only if he is actually "found in" the premises. [ROBERTSON C.J.O.: Does that mean "found" by the police?] I submit so; it means found at the time of his arrest.

If the business conducted on these premises, and the plaintiff's presence there, had been lawful, there could have been no question of our right to recover if, *e.g.*, a fire had started. The appellant's argument would mean that the defendant, because of his own unlawful acts, has an immunity that he would not otherwise have. No case has ever gone to that length, and the argument, if pursued to its logical conclusion, would lead to very startling results. In every case referred to by the appellant, the plaintiff's injury followed directly from his illegal act: see, for example, *Hegarty v. Shine, supra*, at p. 126, and the *Hillen* case at p. 468 (K.B.). Here the same injury might have occurred, whatever the nature of the business being carried on. [ROBERTSON C.J.O.: But the plaintiff was running from the police because of the illegal business on which he had gone there.]

Where the word "lawfully" is used in the cases, it means lawfully *quoad* the occupant, *i.e.*, not tortiously: *Coburn v. City of Saskatoon*, [1935] 1 W.W.R. 392 at 396, [1935] 2 D.L.R. 810.

As to a "limited" invitation, I refer to *Toronto Board of Education and Miller v. Monarch Brass Manufacturing Co.* (1923), 24 O.W.N. 490, affirmed (1924), 25 O.W.N. 705. There must be something to indicate that the invitation is limited. [ROBERTSON C.J.O.: Is that not inconsistent with some of the

cases, such as those where a guest has wandered through an hotel at night?] There were circumstances in *Knight v. Grand Trunk Pacific Development Co.*, [1926] S.C.R. 674, [1927] 1 D.L.R. 498, which gave such an indication.

It was entirely reasonable for the plaintiff, who had seen steps on the outside, to assume that he could take at least one step through the door with safety. The mere existence of this door, standing open, with a screen door outside, was an invitation to use it, as much as if the word "Exit" had been above it. A person who invites others to use his premises is bound to provide for those who wish to leave in a hurry, as well as for others. [ROBERTSON C.J.O.: Why should the mere existence of a door be an invitation to use it?] It had all the appearance of being an ordinary means of exit.

Apart from the question of illegality, it would be difficult to argue that these premises were not dangerous. [ROBERTSON C.J.O.: There was a well-known means of leaving them, which was quite safe, and the only reason the plaintiff used this other means was his fear of the police. All that an occupier has to do is to guard against what is reasonably to be expected.] In the *Board of Education* case, *supra*, the plaintiff elected to leave by a door other than that by which he had entered.

G. A. Martin, K.C., in reply: A visitor to a disorderly house could probably be convicted of an offence even if the police did not actually find him there. Here the plaintiff, by his frequent visits to the premises, and by placing bets, had encouraged the commission of a crime, and might have been charged as a party under s. 69 of the Code, or for conspiracy: *Rex v. Jacobs et al.*, [1944] K.B. 417, [1944] 1 All E.R. 485, 30 Cr. App. R. 1. In any case, even if he could not have been convicted of a crime, he was closely connected with the illegal act.

An invitee is a person invited to premises for the mutual advantage or interest of himself and the occupier. Here the mutual interest was that of betting, which is not recognized by law.

Willes J., in *Indermaur v. Dames*, *supra*, did not speak of the plaintiff being lawfully on the premises, but of his being there on lawful business.

Both *Coburn v. City of Saskatoon* and the *Board of Education* case are distinguishable on the facts. There is no indication here that the defendants realized that there was a danger

of people using this door and being injured. [ROBERTSON C.J.O.: We considered that question in *Decker v. Bracebridge Garage*, [1944] O.R. 16, [1944] 1 D.L.R. 81.]

Under *Indermaur v. Dames*, a plaintiff, as a *sine qua non* of recovery, must show that he was using reasonable care on his own behalf—it is not a mere matter of contributory negligence, but a condition of recovery: Salmond on Torts, 10th ed. 1945, p. 479.

Cur. adv. vult.

21st May 1946. ROBERTSON C.J.O.:—I have had the privilege of reading the reasons for judgment of my brother Roach, and I agree with him.

The respondent had been often in the premises from which he was escaping when he received the injuries in respect of which he sues. He went there with some regularity, and knew what went on there. His counsel would not concede that thereby the respondent was guilty of an offence against s. 228(1) of The Criminal Code, R.S.C. 1927, c. 36. In fact, counsel presented his contention that the only crime consists in being literally “found in”, in terms to suggest that when warning was given of the police, the respondent, and others in like position, would have avoided the guilt of any offence against the law if, by any means, they had managed to escape from the room before the police entered and they were “found in”. That is the logical conclusion of the argument presented, and, with all respect to the able counsel for the respondent, in my opinion it is enough to show the fallacy in his premises. The presence of the respondent in the room where betting was being carried on was, on his own account of it, an offence against s. 228(1) of The Criminal Code, and his knowledge of his guilt was the true reason for his hurried escape.

In *Beresford v. Royal Insurance Company, Limited*, [1938] A.C. 586, Lord Atkin discusses a number of cases that deal with a claim to enforce alleged rights resulting from crime. There is this quotation from *In re Crippen*, [1911] P. 108 at 112: “It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime.” Lord Atkin puts his own statement of the rule in these words, “I think that the principle is that a man is not to be allowed to have recourse to a Court of Justice to claim a benefit from his crime whether

under a contract or a gift. No doubt the rule pays regard to the fact that to hold otherwise would in some cases offer an inducement to crime or remove a restraint to crime, and that its effect is to act as a deterrent to crime." Reference may also be made to *Hillen et al. v. I.C.I. (Alkali), Limited*, [1934] 1 K.B. 455, affirmed [1936] A.C. 65.

The respondent knew that the ordinary means of exit from the premises was by the stairway up which he entered. That was the way by which he was always in the habit of entering and leaving. It was his sense of his own criminal conduct in being in the premises that occasioned his headlong rush for the nearest way of escape, throwing ordinary caution to the winds. A court of justice will not entertain a claim for injury that arises from such circumstances. The appellants owed no duty to the respondent that a court of justice will recognize, to provide against such an emergency.

LAIDLAW J.A.:—The defendants appeal from a judgment of LeBel J., dated the 27th day of October 1945, awarding the plaintiff the sum of \$6,500 damages.

The facts are clearly set forth in the judgment of my brother Roach.

The basis of the claim made by the plaintiff, and which he seeks to establish, is set forth in the statement of claim as follows:

"On the 12th day of August . . . the plaintiff was lawfully on the premises . . . with the consent and at the request or invitation of the defendants"

There is no evidence upon which the court could find that the plaintiff was lawfully on the premises, or at the place where the accident occurred. On the contrary, it is abundantly plain that he was unlawfully there, and indeed his presence made him guilty of a crime: s. 228(1) of The Criminal Code. He was not on the premises with any consent which the courts will acknowledge or give effect to. It is unthinkable that the courts would recognize a request or invitation to a person to do an act, namely, to be present on the premises in question, in violation of the provisions of The Criminal Code. I venture the view that a person who is injured on premises while he is there in the course of committing a criminal act, cannot successfully employ the process of the court to enable him to recover com-

pensation for his injuries from a person or persons in occupation of those premises in violation of the criminal law. The case put forward by the plaintiff has not been made out and fails completely for want of foundation.

The appeal should, therefore, be allowed and the action dismissed. There should be no costs to either of the parties in this court or in the court below.

ROACH J.A. [after stating the facts as above]:—The learned trial judge treated the plaintiff as though he had the status of an invitee, and found as a fact that the defendants Birkner and Cassey, being in occupation and control of the premises, had not discharged the duty which as occupants they owed to the plaintiff as an invitee.

The plaintiff's presence in the premises in question made him guilty of a crime. Section 228(1) of The Criminal Code provides as follows:

"Every one who, without lawful excuse, is found in any disorderly house shall be liable on summary conviction to a penalty not exceeding one hundred dollars and costs and in default of payment to two months' imprisonment."

Counsel for the respondent put forward the rather novel argument that under the foregoing section the crime consisted, not in being present in such premises without lawful excuse, but in being "found" therein. That argument, though ingenious, is not meritorious. If this were a case of first impression, I should not hesitate to construe the section as creating it an offence to be present in such premises without lawful excuse and to hold that the word "found" merely relates to the proof of the commission of the offence and is not of the essence of the crime. Authority, at least by analogy, is not entirely lacking. In *Thomas v. Powell* (1893), 57 J.P. 329, the question for determination was the meaning of the words "found on" premises covered by a licensing Act. On an appeal on a question of law from an acquittal by justices of the peace, it was held that "it is enough to satisfy these words if the person has been detected or seen, or clearly ascertained to have been, on the premises at the time alleged."

Here we have it on the sworn evidence of the plaintiff himself that he was on the said premises without lawful excuse, and no better proof could be required.

I have not found any reported decision, either in our own courts or in England, and none was cited, in which the status of a person who goes upon premises of another at his invitation, express or implied, for a criminal purpose, has been considered, but I feel confident that such a person has not the status in law of an invitee. An invitee is a person who goes upon premises of another not as a mere volunteer or licensee or guest or servant, but upon business which concerns the occupier and upon his invitation, express or implied: *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 at 288, affirmed (1867), L.R. 2 C.P. 311. The "business which concerns the occupier", and in connection with which the occupier expressly or impliedly extends the invitation, must be a lawful business, and not one the operation of which amounts to a crime. The defendants were guilty of a crime as being the keepers of a disorderly house contrary to s. 229 of The Criminal Code, and the plaintiff was guilty of a crime, as already stated, in frequenting the same.

Nor do I think that the plaintiff was a licensee in law. A licensee is one who has not been invited in any way to come to the premises, but has been permitted thereon. Permission means that he has the consent of the occupier. In determining the respective rights and liabilities of the occupier and of one who, as here, in entering upon the premises is committing a crime, the Court will not take cognizance of that which the parties may say was the "consent" given by the occupier. The occupier cannot, in law, "consent" to the frequenter committing the crime.

The duty owing by the defendants as occupiers to the plaintiff was, therefore, neither the duty owing to an invitee nor that owing to a licensee, and their only duty to him was not to injure him deliberately or to do some act with reckless disregard of his presence in the premises. These defendants did neither. The plaintiff's injuries were sustained when, in a panic, he attempted to escape, thinking that a raid by the police was taking place or was imminent. In his hurried flight he passed through the door beyond which, even if he had been present for some lawful purpose, it could not have been said that he had been invited to go or through which he had permission to pass. For the foregoing reasons the appeal should be allowed and the action should be dismissed.

The appeal should be allowed on another ground. The operator of a common betting house would soon discontinue his nefarious business if the patronage of all his customers ceased. It is their patronage which sustains him in that business. They participate with him in its operations.

In *Colburn v. Patmore* (1834), 1 Cr. M. & R. 73 at 83, 149 E.R. 999, Lord Lyndhurst is quoted as follows:

"I know of no case in which a person who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime. It is not necessary to give any opinion upon this point; but I may say, that I entertain little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission."

Quite apart from participation in criminal misconduct, such as I have referred to, the plaintiff here must put his own criminality in the very forefront of his case. Upon it he must rely; otherwise he has no case. He was forbidden by the criminal law of Canada to enter the very premises which he now complains were dangerous. To me it seems almost ludicrous that he should now ask to be compensated for injuries which resulted from his own criminal misconduct.

It should be said that the circumstances under which the plaintiff was upon the said premises are not disclosed in the pleadings, for reasons that are obvious, the plaintiff merely pleading that he was there "with the consent and at the request or invitation of the defendants". The defendants did not attempt to plead their own unlawful conduct or the unlawful conduct of the plaintiff. The plaintiff's case being founded on an allegation of a breach of duty owing by the defendants to him, it became incumbent upon him to establish by evidence the circumstances under which he was present, in order that the nature of that duty might be ascertained by the Court. All the circumstances having been disclosed by the evidence, the Court will leave the plaintiff where he put himself, and not assist him.

The appeal should be allowed and there should be no costs to either of the parties, either in the court below or on the appeal.

Appeal allowed without costs.

Solicitor for the plaintiff, respondent: J. Al. Kennedy, Windsor.

Solicitor for the defendants, appellants: Gerald McHugh, Windsor.

[COURT OF APPEAL.]

Re Wilmot et al. and The City of Kingston.

Municipal Corporations—Zoning By-laws—Effect—Land Used before Passing of By-law for Purposes Contrary thereto—Erection of New Buildings — The Municipal Act, R.S.O. 1937, c. 266, s. 406, as amended by 1941, c. 35, s. 13, and 1943, c. 16, s. 11.

A municipality has power, under s. 406 of The Municipal Act, as amended, to prohibit the erection of new buildings to be used for purposes prohibited by the by-law, even on lands which were used for such purposes on the day of the passing of the by-law. *City of Toronto Corporation v. Trustees of the Roman Catholic Separate Schools of Toronto*, [1926] A.C. 81, applied; *Wilmot et al. v. The City of Kingston*, [1945] O.R. 532, considered.

AN APPEAL by the City of Kingston from an order of Urquhart J., made in Weekly Court at Toronto, directing the appellant to issue a building permit to the respondents. The facts are stated in the reasons for judgment of Laidlaw J.A.

21st February 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and HOGG JJ.A.

H. E. Manning, K.C., for the appellant: Previous cases have not held that a by-law cannot prohibit the extension of existing buildings, and the matter is really concluded by the decisions in *City of Toronto Corporation v. Trustees of the Roman Catholic Separate Schools of Toronto*, [1926] A.C. 81, [1925] 3 D.L.R. 880, and *City of Chatham v. The Sisters of St. Joseph of the Diocese of London et al.*, [1940] O.W.N. 548, [1941] 1 D.L.R. 506. The buildings now proposed by the respondents are of a kind and extent prohibited by s. 9.3.1 of By-law no. 184, and no permit should be issued for them. On a true construction of subss. 1, 2 and 9 of s. 406 of The Municipal Act, R.S.O. 1937, c. 266, as enacted by 1941, c. 35, s. 13(1) and 1943, c. 16, s. 11(2), this section of the by-law is effective to justify the refusal of this permit.

No previous decision has held that buildings may be extended on restricted lands beyond the space occupied at the time of the passing of the by-law. [LAIDLAW J.A.: The character of the buildings is fixed as of the passing of the by-law, and nothing can be done to violate that character.] Yes; the buildings proposed by the respondents are of a character and extent prohibited by s. 9.3.1 of the by-law. The respondents have no vested right to use the lands in question to any greater extent, as to either lands or buildings, than at the time of the passing of the by-law. [ROBERTSON C.J.O.: We are not concerned with "use". This is an application to build. A prohibition against use does not necessarily prevent building.] The words "enlarge" and "extend" in s. 9.3.1 of the by-law are surely synonymous with "erect". It is impossible to enlarge or extend without erecting. The proposal here is to add to an existing structure.

The Municipal Act is remedial legislation, and any by-law passed pursuant to it must be given a fair interpretation. It is necessary to look at the whole statute.

J. R. Cartwright, K.C., for the respondents: We rely upon the judgment of this Court in a previous matter between the same parties: *Wilmot et al. v. The City of Kingston*, [1945] O.R. 532, [1945] 4 D.L.R. 291, which related to matters of fact as well as matters of law, and is therefore binding on the parties, the facts in the present appeal being identical with those dealt with in that judgment. The appellant contended before Urquhart J. that the Court of Appeal, in the earlier judgment, had not given due consideration to s. 406(9) of The Municipal Act, as enacted in 1943. That subsection was not overlooked, and was referred to by the present appellant in the memorandum which it then filed. There is nothing in it to throw doubt on the correctness of the Court's decision. It provides for lands and buildings, used before the passing of the by-law for a purpose prohibited by it, being later extended. In the present case the City, under subs. 9, might amend By-law no. 184 so as to permit us to extend our dairy plant on to the adjoining lands, acquired after the passing of the by-law. The principle of *stare decisis* makes the previous judgment conclusive of the present appeal: 19 Halsbury, 2nd ed. 1935, p. 255.

Section 1.1 of the by-law is not effective to prevent our proposed scheme, which is a remodelling project. There will be

merely an extension of the old building. There will be substantial changes, but the present building will remain as part of the structure; the project is clearly no more than an alteration, by enlargement and extension. The purpose of the by-law is to prevent the erection of such buildings in the future, and the Legislature has given power to prevent interference from the business with the rights of other property-owners.

As to the construction of s. 406 of The Municipal Act, as amended, we refer to 31 Halsbury, 2nd ed. 1938, pp. 502, 506. The statute must be construed as a whole, and if there is any doubt we are entitled to a favourable construction by reason of our rights of ownership. On any construction other than we suggest, the exception provided for in s. 406(2) would be of little value, because it could continue only for the life of an existing building. It was necessary to provide for the situation of an owner, who had previously used buildings for a purpose prohibited by the by-law, and who desired to extend his business on to another piece of land. [ROBERTSON C.J.O.: The word "or" in the phrase "land or buildings" is significant.]

If parts of this by-law are held to be bad, the whole by-law must fall: *City of Chatham v. The Sisters of St. Joseph of the Diocese of London et al.*, [1940] O.W.N. 548, [1941] 1 D.L.R. 506.

[LAIDLAW J.A.: Surely subs. 9 of s. 406, as enacted in 1943, must be seriously considered in arriving at the meaning of subss. 1 and 2, and of the by-law.] So long as the question is confined to the use of land, the amendment is unnecessary, but it is needed where an existing business is to be extended on to other land. We come within this legislation in this case.

H. E. Manning, K.C., in reply: Section 406(2) creates an exception from the general rule established by s. 406(1). It should be read disjunctively as if it were two subsections, the one applying to prohibition of the use of land, referred to in clause 1 of s. 406(1), and the other to prohibition of the use or erection of buildings, dealt with in clause 2 of that subsection. The past tense is used. The construction put upon the legislation by the learned judge below is based upon an assumption that the past tense covers future developments, and buildings not in existence when the by-law was passed. Section 406(2) permits only such extensions as have already been approved by the city architect. There is no ambiguity.

If part of the by-law is invalid, and a proper and natural meaning can be given to other parts without it, those other parts should stand. The necessity for the approval of the Municipal Board makes no difference in this connection.

Cur. adv. vult.

21st May 1946. ROBERTSON C.J.O.:—I have had the privilege of reading the reasons for judgment prepared by Laidlaw and Hogg JJ.A., and I agree in the result at which they have both arrived.

LAIDLAW J.A.:—The Corporation of the City of Kingston appeals from an order of Urquhart J., dated the 22nd day of October 1945, made upon motion in Court on behalf of the respondents. The Court ordered and adjudged “that the Corporation of the City of Kingston do forthwith issue to the Plaintiffs a building permit, permitting them to alter and enlarge the buildings now standing on parts of Lots 580 and 581 on the west side of Frontenac Street in the City of Kingston, as shown on a Plan . . . [*a particular description follows*] and to build new buildings thereon in accordance with the plans and specifications filed on the application for permit dated June 26th 1945”

The question to be decided by the Court is whether the provisions contained in By-law no. 184, passed by the council of the Corporation of the City of Kingston on 15th December 1941, are effective in law to prohibit the respondents from (a) altering and enlarging the buildings in use by the respondents at the time the by-law was passed for purposes contrary to the provisions thereof, and (b) building new buildings on land likewise used for such purposes at that time.

It will be convenient to reproduce relevant parts of By-law no. 184, and also certain sections of The Municipal Act, R.S.O. 1937, c. 266, as amended:

“BY-LAW No. 184

“A BY-LAW FOR THE ZONING OF THE CITY OF KINGSTON.

Passed December 15th, 1941.

“Section 1—General.

“1.1. Scope of this By-law.

“Within the City of Kingston, no dwelling, business, trade or industry shall be located, nor shall any building or structure be

erected, altered or used, nor shall any land be used, except in conformity with the regulations of this By-law.

"1.2. Use Zones.

"For the purposes of this By-law the municipality is hereby divided into "USE ZONES" . . .

"1.3. Classification of Use Zones.

"The Use Zones are: . . .

"C. Multiple-family dwelling zone.

"Section 6—Regulations Governing Zone 'C'.

"6.1. General.

"Except as hereinafter provided, all structures and parts thereof erected or altered in Zone 'C' shall conform to the regulations of this Section.

"6.2. Permissible Uses.

"No building or part thereof and no land shall be used for purposes other than: . . .

"(c) A retail store or shop.

"6.5. Percentage of Lot Occupancy.

"(a) Subject to Clause (b), no building shall occupy more than sixty per cent. of the area of the lot upon which it is situated if an interior lot, nor more than seventy-five per cent. of the area if a corner lot.

"Section 9—Supplementary Regulations.

"9.3. NON-CONFORMING USES.

"9.3.1. Existing Structures.

"Subject to Item 9.3.2. a building, which, at the date of enactment of this By-law, is used for a purpose not permissible within the district in which it is located, shall not be enlarged, extended, reconstructed, or altered structurally, unless such building is thereafter to be used for a purpose permitted within such district, provided that the interior of such building may be reconstructed or altered, in order to render the same more convenient or commodious for the same purpose for which, at the date of enactment of this By-law, such building is used.

"9.3.2. Partial Destruction of Existing Buildings.

"A building which is damaged to the extent of fifty per cent. or more of its value (exclusive of walls below grade) as at the

date of the damage and as determined by fair building standards, and which does not conform with the requirements of this By-law in respect of use, lot occupancy or height, shall not be restored except in conformity with the regulations for the use zone in which such building is located . . .

"9.3.3. Extension of Non-Conforming Uses.

"Any use made of buildings or lands at the date of enactment of this By-law may be continued, although not conforming with the regulations of the use zone in which they are located, or such use may be extended throughout the building, provided, in either case, that no structural alterations, other than those provided in Item 9.3.1., or as may be required by existing law or by-law, are made therein, and that no new building or extension to such building is erected.

"10.45. Use, Non-conforming.

"'Non-conforming use' shall mean any use of a building or premises that does not conform to the regulations of the use zone in which such building or premises is located."

The Municipal Amendment Act, 1941 (Ont.), c. 35, provides in part as follows:

"13.—(1) Section 406 of *The Municipal Act* is repealed and the following substituted therefor:

"'406.—(1) By-laws may be passed by the councils of local municipalities:

Restricted Areas.

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law, within any defined area or areas or abutting on any defined highway or part of a highway.

2. For prohibiting the erection or use of buildings, for or except for such purposes as may be set out in the by-law, within any defined area or areas or upon land abutting on any defined highway or part of a highway.

3. For regulating the cost or type of construction and the height, bulk, location, spacing, character and use of all buildings to be erected or altered within any defined area or areas or upon land abutting on any defined highway or part of a highway, and the minimum frontage of the parcel of land and

the proportion of the area thereof which any such building may occupy, and any such by-law may regulate all or any of such matters.

4. For acquiring vacant land having a frontage less than the minimum frontage prescribed for such area, for the purpose of including such land in such area, and for disposing of such land.

“(2) No by-law passed under this section shall apply to any land or building which, on the day of the passing of the by-law, is used or erected for any purpose prohibited by the by-law, so long as it continues to be used for that purpose, nor shall the by-law apply to any building the plans for which have prior to the day of the passing of the by-law been approved by the municipal architect or building inspector, so long as the building when erected is used for the purpose for which it was erected.

“(3) No part of any by-law passed under this section shall come into force without the approval of the Municipal Board.

“(4) No part of any by-law passed under this section and approved by the Municipal Board shall be repealed or amended without the approval of the Municipal Board . . .

“(7) The Municipal Board may approve any such by-law in whole or in part and as to the whole or any part of any land, area or highway therein defined, and the Municipal Board may have regard to the restrictions on any land adjacent to such land, area or highway.

“(8) Such approval shall not become effective until the issue by the Municipal Board of its formal order thereof.”

The Municipal Amendment Act, 1943 (Ont.), c. 16, provides in part:

“11.—(1) Subsection 3 of section 406 of *The Municipal Act*, as re-enacted by subsection 1 of section 13 of *The Municipal Amendment Act, 1941*, is repealed and the following substituted therefor:

“(3) No part of any by-law passed under this section shall come into force without the approval of the Municipal Board, and such approval may be for a limited period of time only, and the Board may extend such period from time to time upon application made to it for such purpose.”

“(2) The said section 406 is further amended by adding thereto the following subsections:

“(9) Notwithstanding any other provision of this section, any by-law passed under this section or under any provision deemed to be consistent with this section by subsection 3 of section 13 of *The Municipal Amendment Act, 1941*, may with the approval of the Municipal Board be amended so as to permit the extension or enlargement of any land or building used for any purpose prohibited by the by-law if such land or building continues to be used in the same manner and for the same purpose as it was used on the day such by-law was passed.

“(10) Notwithstanding the provisions of *The Ontario Municipal Board Act*, the Municipal Board may authorize any member thereof to hear and determine any application under this section and when so authorized such member shall have and may exercise all the powers of the Municipal Board.’”

Before and on the date By-law no. 184 was passed, the respondents carried on the business of a dairy on part of lots 580 and 581 on the west side of Frontenac Street in the city of Kingston. The main plant was situated on lot 580 and consisted of a dairy building, in which an office was located, a detached stable and a detached garage. They sold milk and a chocolate beverage over a counter on the premises and by retail sale directly to the householders throughout the city.

On 2nd June 1944, the respondents became the owners by deed of the westerly 50 feet of the south half of lot 581. On or about the 16th November 1944, they applied to the City Engineer of the city of Kingston for a building permit to construct a cement block building, 27 feet by 37 feet, to be used in connection with their business. The building was to be constructed on the part of lot 581 acquired by the respondents in June 1944. The permit was refused on the ground that the proposed building contravened the by-laws of the city of Kingston. A motion was thereupon made to the Court on behalf of the respondents for a mandatory order that the City issue a permit as applied for. The motion was dismissed by an order of MacKay J. dated the 19th February 1945, and an appeal therefrom to this Court was dismissed by an order dated the 7th June 1945. In reasons for the order of the Court of Appeal, as given by Roach J.A. (reported [1945] O.R. 532, [1945] 4 D.L.R. 291), the view is expressed that subss. 9.3.1, 9.3.2 and 9.3.5 of By-law no. 184 are *ultra vires*. The formal order of the Court does not contain such a declaration as part of the judgment of the

Court. Nevertheless, counsel relies upon the opinion and urges that effect ought to be now given to the views expressed by the learned Justice of Appeal in the earlier proceedings. It ought to be borne in mind, however, that the motion before the Court, and the question to be determined in those proceedings, were substantially different from those in the present proceedings. The respondents previously proposed to erect a building on land which was not acquired by them until after By-law no. 184 was passed and not used by them for any prohibited purpose prior to or at that time. The permit which they sought to obtain from the City included that building, and the real question to be determined by the Court was whether under those circumstances the proposed plan of construction was in contravention of the provisions of the by-law. The respondents altered their plans, and now are endeavouring to obtain a permit for the alteration and enlargement of buildings in use on the date the by-law was passed for purposes contrary to its provisions, and for the erection of new buildings on land used at that time for the same purpose. I think that the question to be now decided is not concluded by the judgment of this Court in the former proceedings. I give to the views expressed by Roach J.A. my most serious consideration and respect, but do not feel bound by them in the matter now in controversy between the parties. The question may be approached in two steps: Firstly, what legislative power did the council of the municipality possess to prohibit the things which the respondents seek to do? Secondly, if such power existed, has it been effectively exercised by By-law no. 184?

Section 406(1) of The Municipal Act, as re-enacted in 1941, covers two classes of property: (1) land and (2) buildings. The restriction in respect of each class of property is the subject of a separate provision. The prohibition as to land is against the use of it, and as to buildings is against the erection or use. There is no limitation imposed directly by the provisions of the statute upon the legislative power vested in the councils of the municipalities by s. 406, but the scope of application of the by-law is expressly limited by subs. 2 thereof. That subsection excepts from the application of such a by-law certain lands particularly described, and also certain buildings particularly described, which I enumerate as follows: (1) land which is used on the day of the passing of the by-law for any purpose

prohibited by the by-law, so long as it continues to be used for that purpose; (2) any building which is used or erected on the day of the passing of the by-law for any purpose prohibited by the by-law, so long as it continues to be used for that purpose; and (3) any building, the plans for which have, prior to the passing of the by-law, been approved by the municipal architect or building inspector, so long as the building when erected is used for the purpose for which it was erected.

Thus, if land is used on the day of the passing of a by-law for a purpose prohibited thereby, that use may continue, and such a by-law by express statutory provision is not applicable to that land so long as it continues to be used for that purpose. If the use for that purpose ceases, the by-law thereupon becomes applicable and the land cannot thereafter be used for a prohibited purpose. In the same manner, and to the same extent, the use of any building in existence at the time a by-law is passed for a purpose prohibited by the by-law may continue. But the right of a property owner or user at the date of the passing of such a by-law is fixed and limited in consequence thereof. It is thereafter subject to the provisions of any by-law enacted in the proper exercise of the legislative powers of the council of the municipality. The effect of such an enactment is to prohibit the erection of any building after the date of the passing of the by-law on premises which on that date were used for purposes prohibited thereby. This is made plain, I think, by the reasons given by Viscount Cave L.C. in *City of Toronto Corporation v. Trustees of the Roman Catholic Separate Schools of Toronto*, [1926] A.C. 81 at 88-9, [1925] 3 D.L.R. 880.

Thus, in my opinion, it was within the power of the appellant municipality to pass a by-law the provisions of which would effectively prohibit the erection by the respondents of a building on land used by them at the date of the passing of the by-law for purposes prohibited thereby, and that notwithstanding such use at that time. The council of a municipality could not of course make such a by-law applicable to a building for which plans had received the specified approval at the date of the passing of the by-law. That case is not now in question. I am of opinion also that a by-law passed in proper form by the council of a municipality, pursuant to the powers contained in s. 406(1) of The Municipal Act, must be construed so as to

include a prohibition against any alteration or reconstruction of any existing building by way of addition, enlargement or extension to it. The fact that a separate section of a by-law makes express provision for work of that nature does not, in my opinion, make such sections void or *ultra vires*; nor does that particularization affect the validity of the by-law as a whole. Alteration or reconstruction of that kind is nonetheless within the language of the statute, "erection . . . of buildings". Finally, when one reads and gives proper effect to subs. 406(9), as enacted in 1943, and as read together with subss. 1 and 2, it becomes plain that a by-law passed under the general powers of a council, as contained in s. 406(1), extends to prohibit the "extension or enlargement" of any land or building used for any purpose prohibited by the by-law on the day such by-law was passed, excepting works of erection for which plans have received the specified approval prior to that date. The council of the municipality may (with the approval of the Municipal Board) amend such a by-law to permit such "extension or enlargement". In the absence of such an amendment, the provisions of the by-law are operative and effective, with only the exceptions mentioned, and it does not in such circumstances lie within the power of the council to permit such work.

Have the powers contained in s. 406 of The Municipal Act been exercised by By-law no. 184 effectively to prohibit the proposed work of construction on the premises of the respondents? Section 1.1 expressly provides, *inter alia*, that no building shall be erected within the city of Kingston except in conformity with the regulations of the by-law. The premises in question are subject to regulations governing Zone "C", as set forth in s. 6 of the by-law. By s. 6.1, all structures and parts thereof erected or altered in that zone (with certain exceptions) shall conform to the regulations of the section. Section 6.2 provides that "no building or part thereof and no land shall be used for purposes other than: . . . a retail store or shop". I do not discuss at length the question whether any building now erected or proposed falls within the exception "a retail store or shop". I am certain that it does not. The reasons given by Roach J.A. in *Wilmot et al. v. The City of Kingston*, *supra*, at p. 538, are abundantly clear and satisfying on this point.

Section 9.3.1, in my opinion, covers particular classes of structural work, namely, enlargement, extension, reconstruction

or alteration, all of which, in my opinion, fall within the meaning of the language "erection of buildings", as used in the statute. They add nothing to the effective prohibition found in s. 1.1 and s. 6, nor do they nullify or detract from the effect of those sections. Likewise, in s. 9.3.2. the use of the word "restored", in connection with a building damaged by fire, is within the scope and meaning of the words "erection . . . of buildings". Section 9.3.3 is perhaps intended to express and give effect to the exceptions from application of the by-law, as contained in s. 406(2) of the statute, but does not affect the validity of the by-law. There is no other appropriate provision for the statutory exceptions, but such a provision is not essential to the validity of the by-law: *Re Toronto Roman Catholic Separate School Board and Price* (1923), 54 O.L.R. 224 at 230; see also on appeal, [1924] S.C.R. 368, [1924] 3 D.L.R. 113; [1926] A.C. 81, [1925] 3 D.L.R. 880, referred to by Roach J.A. in *Wilmot et al. v. The City of Kingston*, *supra*, at p. 538.

I add my view in accordance with that of the Honourable The Chief Justice of Ontario expressed in *City of Chatham v. The Sisters of St. Joseph of the Diocese of London et al.*, [1940] O.W.N. 548 at 554, [1941] 1 D.L.R. 506, that it is doubtful whether the Court can properly hold one part or parts of the by-law to be *ultra vires* and the remainder to be valid, because of the express requirements of the statute in subss. (3) (4) (7) and (8) as to approval by the Municipal Board.

My conclusion is that By-law no. 184 effectively prohibits the alteration and enlargement of the buildings now standing on the lands particularly described in the judgment of the Court below, and the erection of new buildings thereon.

Consequently, this appeal ought to be allowed with costs. The judgment of Urquhart J. ought to be set aside, and in place thereof the order should be that the motion be dismissed with costs.

HOGG J.A.:—This is an appeal by the Corporation of the City of Kingston from an order of Urquhart J. directing the said Corporation to issue a building permit to the respondents "permitting them to alter and enlarge the buildings now standing on parts of Lots 580 and 581 on the west side of Frontenac Street, in the City of Kingston", which said land is more particularly described in the order, and permitting the respondents "to build

new buildings thereon" in accordance with the plans and specifications filed on the application for the building permit.

The respondents carry on a dairy business under the name of Crown Dairy, in and upon the above mentioned premises.

By virtue of s. 406 of The Municipal Act as re-enacted by The Municipal Amendment Act, 1941, c. 36, s. 13, the municipality of the City of Kingston passed, on the 15th December 1941, By-law no. 184, entitled "A By-law for the Zoning of the City of Kingston." The relevant portions of s. 406 of the statute, and of the by-law, are set out in full in the judgment of Roach J.A. in *Wilmot et al. v. The City of Kingston*, [1945] O.R. 532, [1945] 4 D.L.R. 291, in the Court of Appeal, to which I shall make further reference.

At the time the by-law aforesaid was enacted, the land and the buildings thereon, which comprise the premises with which this appeal is concerned, were used, and they are still used, by the respondents for purposes prohibited by the by-law, that is to say, for the purposes of a dairy business. Prior to the enacting of By-law no. 184, the respondents acquired a portion of land adjoining the premises in use by them at the time the by-law was passed, but they had never used the same for the purposes of their business. After the by-law was enacted, they applied to the appellant for a permit to construct a building upon the newly-acquired land. The appellant refused to grant such permit whereupon the respondents moved before Mackay J. for a *mandamus*, which was refused.

This order was upheld on appeal and Roach J.A., who delivered the judgment of the Court of Appeal, held that By-law no. 184 prohibited the use for dairy purposes of lands acquired before the by-law was passed but not in use by the respondents at the date of the passing of the by-law for the purposes of the dairy. There are certain observations made by the learned Justice of Appeal with respect to the validity of several sections of the by-law, but these observations, in my view, were *obiter* and not necessary in arriving at the decision pronounced upon the issue then before the Court.

Subs. 2 of s. 406 of the statute reads in part:

"No by-law passed under this section shall apply to any land or building which, on the day of the passing of the by-law, is used or erected for any purpose prohibited by the by-law, so long as it continues to be used for that purpose . . ."

The respondents state in an affidavit made in connection with this application that in the former application made in November 1944 to the appellant, a permit was requested to construct a cement block building to be used in connection with their business. The former judgment of this Court, as has been stated, held that the land upon which the respondents desired to erect this building could not be used for such purpose because of the provisions of the said by-law. The respondents furthermore state in their affidavit that the permit they now desire to obtain from the appellant, is for the construction of a building on land used by them in their dairy business at the time the by-law was enacted.

The decision of the Judicial Committee of the Privy Council, in *City of Toronto Corporation v. Trustees of the Roman Catholic Separate Schools of Toronto*, [1926] A.C. 81, [1925] 3 D.L.R. 880, constitutes the leading authority whenever s. 406 of The Municipal Act, and by-laws passed thereunder, are discussed. Para. (a) of s. 399a of The Municipal Act, as enacted in 1921, is the subject of consideration in this appeal, and this paragraph is almost identical in its language with subs. 2 of s. 406 of the present Municipal Act. The separate school board had purchased two adjoining houses and land pertaining thereto, for the purposes of a school. In one of the buildings, the board commenced to carry on a school, and to use part of the land of the adjoining premises which had been purchased, as a school yard. The land and premises were known as nos. 14 and 18 Prince Arthur Avenue. The school board then applied to the City for a permit to make alterations to the building they had commenced to use as a school and for an additional permit to build a new school building which would cover part of both pieces of land. The City refused to grant the permits, and the school board brought proceedings against the City for a *mandamus*. The City then passed a by-law prohibiting the erection of any buildings or the use of certain land, fronting on Prince Arthur Avenue and including the premises in question. The application for a *mandamus* was then heard and was dismissed, and an action subsequently brought by the school board to quash the by-law, and an action by the City for an injunction against the use by the school board of that part of the lands not used for school purposes before the passing of the by-law, were tried together by Middleton J. The action of the school board was dismissed, and

the injunction was granted. The judgment held that the by-law was valid but did not apply to the school property, except that part not in use for school purposes when the by-law was passed. The appeal of the board to the Appellate Division against the order refusing a motion for a *mandamus* and against the judgment was dismissed: 54 O.L.R. 224.

An appeal from the judgment of the Appellate Division was allowed by the Supreme Court of Canada, which ordered that the City should grant a permit "for the erection of a building upon the said lands": [1924] S.C.R. 368, [1924] 3 D.L.R. 113.

An appeal was then taken to the Privy Council, which allowed the appeal and restored the order of the Appellate Division. Viscount Cave L.C., who delivered the judgment of the Privy Council, said, at p. 86:

"The operation of proviso (a) [of s. 399a of The Municipal Act] is confined to cases where at the date of the passing of a by-law either (1) a building is erected or used for a purpose prohibited by the by-law, or (2) a building is in course of erection, or (3) the plans for a building have been approved by the city architect; and it would appear to their Lordships to be a necessary inference from the express terms of the proviso that where plans have been deposited but not yet approved, and the building is not in course of erection, the operation of the by-law is not excluded."

With respect to the question whether the school board could erect a new school at some future time on those parts of the premises purchased by them, which were used for the purposes of a school at the date of the passing of the by-law, it was held that the board did not have such right, but: "The reasonable repair and improvement of the existing school buildings if in accordance with the by-laws relating to buildings could hardly meet with objection, but the erection of a new building to be used for the prohibited purpose would not fall within the saving of proviso (a) of s. 399a which is confined to 'any land or building which, on the day the by-law is passed is erected or used for any purpose prohibited by the by-law so long as it continues to be used for that purpose.' "

This interpretation placed upon the section seems to differ, in some respects at least, from that expressed by Meredith C.J.O. in his judgment, on the appeal to the Appellate Division. At pp. 230-1, the learned Chief Justice said:—

"For the purpose of the appeal from the judgment in the actions, we cannot look outside of the pleadings and admissions, and upon these I cannot doubt that the judgment of my brother Middleton is right. The admissions shew that the excepted part of the land was not in use for school purposes when the by-law was passed, and therefore the by-law, if a valid by-law and applicable to it, prevents the use of that part of the land except for the purpose of detached private residences

"The only questions open are:— . . .

"(2) Was the whole of the land within the exception of clause (a) [of s. 399a] because it was acquired and could be used only for school purposes or because a part of it was used for those purposes when the by-law was passed? . . .

"The second question should also be answered in the negative. It is only any land and building 'which on the day the by-law is passed is erected or used for any purpose prohibited by the by-law . . .,' that comes within the exception of clause (a).

"As already pointed out, the part of the property to which, according to the judgment, the by-law applies, was not then used for school purposes. It was then in use as land attached to the boarding house."

This language of Meredith C.J.O. would seem to imply that the by-law did not apply to that part of the property consisting of land or buildings which was used for school purposes at the time the by-law was passed, but that it did apply only to that portion of the property consisting of land attached to the boarding house, which was a part of the property owned by, but not in use by, the school. However, by the terms of the judgment of the Privy Council, the by-law does apply to land used for the purposes of the school on the day of the passing of the by-law, because its principal use is restricted in that it can not be built upon. All new building is prohibited.

Orde J.A. in *Re Upper Canada Estates Limited and MacNicol*, [1931] O.R. 465, [1931] 4 D.L.R. 459 affirmed [1932] 2 D.L.R. 528 expressed, at p. 469, his opinion of the effect of the Privy Council judgment:

"The right to use certain parts of the land and buildings for school purposes was recognized by the judgment of the Appellate Division, *Re Toronto Roman Catholic Separate School Board and Price* (1923), 54 O.L.R. 224, but the by-law was upheld as effectively preventing the issue of a permit for the erection of

a school on the unused portion of the lands. And it was the Supreme Court's reversal of this last mentioned ruling that was dealt with by the Privy Council."

But the Judicial Committee, according to the passage of Viscount Cave's judgment which I have quoted, held that the by-law negated the right of the school board to erect a school on any lands owned by the board, not only on those unused for school purposes on the day of the passing of the by-law, but also on lands so used on that date.

When the rule laid down by the judgment of the Privy Council is applied to the case now under consideration, By-law no. 184 restricts the erection of a new building such as the respondents contemplate, although it was to have been built on a portion of land used for dairy purposes at the date of the passing of the by-law. According to the terms of this judgment, the respondents would have the right to carry out reasonable repairs and improvements to buildings existing, and used for the purpose of their business, at the time of the passing of the by-law, and the by-law in question in this appeal provides that certain alterations may be made.

By the provisions of s. 11, of c. 16 of the statutes of 1943, an additional subsection was added to s. 406 of The Municipal Act, which authorized a by-law enacted under the authority of s. 406 to be amended, "so as to permit the extension or enlargement of any land or building used for any purpose prohibited by the by-law if such land or building continues to be used in the same manner and for the same purpose as it was used on the day such by-law was passed."

There is no evidence before the Court that any such amending by-law was ever passed by the appellant.

The term in the order appealed from providing that a permit be issued to the respondents allowing them to build new buildings on parts of lots 580 and 581 must be set aside. In so far as the order directs a permit to be issued allowing the respondents to alter and enlarge the buildings now standing on the above-mentioned land, this term of the order might possibly be varied to provide that a permit be issued to the respondents permitting them only to alter such of the said buildings as were in use by the respondents for the purposes of their dairy business on the day the by-law was passed, and such alterations to be confined to those of the nature and kind permitted by the

by-law in question, subject to the requirements of such other by-law or by-laws as may be in existence governing the alteration of buildings. However, it is possible, and I think probable, that a new application for a permit to allow the alteration of the buildings aforesaid in such manner that the alterations would conform to the provisions of the by-law would be necessary.

I have concluded that the appeal should be allowed and the order appealed from should be set aside, with costs to the appellant of the appeal and of the motion.

Appeal allowed with costs throughout.

Solicitor for the appellant: T. J. Rigney, Kingston.

Solicitor for the respondents: C. M. Smith, Kingston.

[COURT OF APPEAL.]

Brown et al. v. B and F Theatres Limited.

Negligence—Construction of Jury's Findings—Both Parties Found Negligent—Plaintiff's Negligence Subsequent—Dismissal of Action on Appeal.

Negligence—Dangerous Premises—Moving Picture Theatre—Basement Stairway—Sufficiency of Protection.

The plaintiff, thinking she was entering the ladies' room of the defendant's theatre, opened an unlocked door which led to a basement stairway, and fell down the stairs. In an action for damages resulting from her injuries, the jury found that the unlocked door constituted an unusual danger of which the defendant knew or ought to have known, and that the defendant had not used reasonable care to prevent injury from such danger, particulars being the inadequacy of the sign on the door and the lack of "facilities to fasten door in a safe and secure manner". The jury further found that the plaintiff had not used reasonable care for her own safety, in that she did not use proper caution in proceeding after opening the door. They apportioned the negligence 90 per cent. against the defendant and 10 per cent. against the plaintiff. The defendant appealed.

Held, the appeal must be allowed and the action must be dismissed. *Per* ROBERTSON C.J.O. and ROACH J.A.: The jury's findings in respect of the defendant's negligence must be interpreted as a finding that in the circumstances a patron of the theatre might easily mistake one door for the other, that the condition behind the basement door was unusually dangerous, and that the defendant, having regard to that dangerous condition, had been negligent in two respects. This finding was not perverse, but was supported by ample evidence. *Canadian National Railways Company v. LePage*, [1927] S.C.R. 575; *Walker et al. v. Midland Railway Company* (1886), 55 L.T. 489, distinguished. But the finding in respect of the plaintiff amounted to a finding that she could have discovered the danger if she had looked, and that she should have looked, in other words, that her negligence was the cause of her injuries, the defendant's being merely *sine qua non*. In these circumstances, the plaintiff could not recover, and there was no room for the application of The Negligence Act, since the defendant's negligence had not been a contributing cause of her injuries.

Per LAIDLAW J.A. (who agreed with the other members of the Court except in this respect): The jury were not justified, in the circumstances, in finding that the "unlocked door" constituted an unusual danger of which the defendant knew or should have known. The plaintiff was undoubtedly an invitee, and it was essential for recovery by such a person that he or she should have used reasonable care on his own part for his own safety. *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; L.R. 2 C.P. 311; *Norman v. Great Western Railway Company*, [1915] 1 K.B. 584; *Pfister v. Toronto Transportation Commission*, [1946] O.R. 328, applied.

AN APPEAL by the defendant from the judgment of Hope J., entered on the findings of a jury.

The following statement of facts is taken from the reasons of ROACH J.A.:

This is an appeal from the judgment of the Honourable Mr. Justice Hope awarding the plaintiffs, husband and wife, damages on account of injuries sustained by the wife as the result of her having fallen down a stairway in a theatre operated by the defendant company in the city of Toronto.

In the early evening of 27th February 1945, the plaintiff wife and her daughter were patrons at the theatre. After having paid their admission fees and entered the theatre, they separated, the daughter to go to purchase some candy, the mother to go to the ladies' room, where, by arrangement, they were to meet later. The ladies' room opens off the north wall of the foyer of the theatre, which runs east and west, and is toward the easterly end thereof. The mother, who was visiting this theatre for the first time, walked in an easterly direction through the foyer towards the ladies' room which was designated by an illuminated glass sign which projected out from the north wall of the foyer at a height of about 7 feet from the floor. That sign was above the door leading into the ladies' room, but immediately to the west of that door was another door leading to the basement of the building. The space between the two doors was not less than 7 inches nor more than 13 inches,—the witnesses did not agree as to the exact measurement. Both doors were about opposite the northerly end of the easterly aisle of the theatre. There was no sign on the ladies' room door, and on the cellarway door was the word "private" painted in letters 1¼ inches to 1½ inches high. The cellarway door was unlocked and had no facilities for automatically locking it when it was pulled closed. It had a hook-and-eye arrangement but it was not hooked at the time of the accident. Those doors were identical with one another in size and design. They both opened inwards from the foyer, the

cellarway door swinging anti-clockwise, the ladies' room door clockwise. They were each 31 inches wide. The platform at the top of the basement stairs was only 24 inches in width, so that the door, when opened at right angles, protruded beyond that platform about 7 inches. On the east wall of the basement-way, above the platform and about at eye level, was an electric light fixture containing a reasonably brightly lighted electric bulb.

Immediately west of the cellarway door was a fire extinguisher 2 feet high and standing perpendicularly against the north wall of the foyer wall, and the lower end thereof was about 4 feet above the floor. The lighting in the foyer consisted of three clusters of electric lights at the ceiling, about equidistant from each other and from the east and west ends of the foyer. In each of these clusters were three 10-watt electric light bulbs. That lighting was indirect, that is, the reflectors were below the bulbs so that the light was reflected to the ceiling. In addition, there were two floor lamps, each containing low wattage bulbs, standing somewhere near the centre of the foyer. The area of the foyer in the proximity of the doors, therefore, had at least very subdued lighting so as not to interfere with the patrons viewing the pictures on the screen at the south end of the auditorium.

The mother, having arrived at the first of those doors, and mistaking it for the one leading into the ladies' room, opened it and fell down the stairs.

The learned trial judge, with the approval of counsel for the litigants, submitted certain questions to the jury. Those questions, and the jury's answers, are as follows:

"1. Were the injuries to the plaintiff caused by an unusual danger on the defendant's premises, of which the defendant knew or ought to have known? A. Yes.

"2. If your answer to Q. (1) is 'Yes', then state fully in what such danger consisted? A. Unlocked door.

"3. Did the defendant use reasonable care by notice, lighting, guarding or otherwise to prevent injury from such danger? A. No.

"4. If your answer to Q. (3) is 'No', state fully in what respect there was lack of such reasonable care on the part of the defendant? Original answer—"Sign on door is inadequate, and lack of additional protection on unlocked door." Upon being sent back to clarify this answer, the jury returned and gave the

following answer: "Amendment to Question 4—And there were improper facilities to fasten door in a safe and secure manner.

"5. Did the plaintiff, Mrs. Brown, use reasonable care for her own safety in the circumstances? A. No.

"6. If your answer to Q. (5) is 'No', state fully in what respect there was lack of such care on the part of the plaintiff. A. Did not use proper caution in proceeding after opening the door.

"7. If both the defendant and the plaintiff, Mrs. Brown, failed to use reasonable care, is it possible or practicable for you to apportion the degree to which such failure of each contributed to the accident? A. Yes.

"8. If the answer to Q. (7) is 'Yes', then state the degree in which such failure of each so contributed to the accident.

"A. (a) The Defendant 90%

(b) Mrs. Brown 10%

100%

"9. At what amount do you assess the total damages suffered by each of the plaintiffs.

"A. (a) Mrs. Brown \$5,000.00

(b) Mr. Brown 314.00".

On the basis of those answers, the learned trial judge gave judgment for the plaintiff wife in the sum of \$4,500, and for the plaintiff husband in the sum of \$282.

7th May 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

P. E. F. Smily, K.C., for the defendant, appellant: In the absence of any unusual danger beyond the door leading to the cellarway, it was not our duty to keep the door locked. A stairway is not an unusual danger: *Canadian National Railways Company v. LePage (Lesage)*, [1927] S.C.R. 575, [1927] 3 D.L.R. 1030, 34 C.R.C. 300; *Walker et al. v. Midland Railway Company* (1886), 55 L.T. 489, 2 T.L.R. 450. Counsel for the plaintiffs expressly invited the jury to find that there was an unusual danger beyond the door, and asked that they should pass on the question whether the lighting over the stairway was sufficient. The refusal of the jury to make any finding in this respect constitutes an indirect finding that no such danger

existed: *Andreas v. The Canadian Pacific Railway Company* (1905), 37 S.C.R. 1, 5 C.R.C. 450.

It is an essential part of the rule in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 at 288, affirmed (1867), L.R. 2 C.P. 311, that the invitee should have exercised reasonable care for his own safety. If this plaintiff, by the exercise of reasonable care, could have avoided injury despite the negligence found against us, she cannot recover, and the jury's finding is in effect a finding that she could have done so.

D. J. Walker, K.C., for the plaintiffs, respondents: The plaintiff, in acting as she did, undoubtedly entertained the belief that she was doing only what she was entitled to do. She had a right to go to the ladies' room, and because of the sign she believed that she was going into it. The circumstances here are quite different from those in the *LePage* case, *supra*. A more similar case is *Knowlton v. Hydro-Electric Power Commission of Ontario*, 58 O.L.R. 80, [1926] 1 D.L.R. 217, 32 C.R.C. 362, but here the invitation was more real, one door being immediately adjacent to the other.

The facts wholly refute the allegation that the plaintiff was guilty of ultimate negligence. The acts of the parties are so involved with the state of things as to make the case one of contribution, if the plaintiff was guilty of any negligence at all: *Green and Breckenridge v. Canadian National Railways*, [1932] S.C.R. 689, [1932] 4 D.L.R. 593, 40 C.R.C. 157.

P. E. F. Smily, K.C., in reply.

Cur. adv. vult.

22nd May 1946. ROBERTSON C.J.O. agrees with ROACH J.A.

LAIDLAW J.A.:—I have had the benefit of perusing the reasons for judgment of my brother Roach, and am in agreement with the views expressed by him, except in one respect. I think that the jury could not reasonably or properly find that the "unlocked door" constituted an unusual danger on the defendant's premises, of which the defendant knew or ought to have known. There was no evidence of any actual knowledge on the part of the defendant, and likewise in my opinion there was no evidence upon which such knowledge could be imputed to the defendant. The unlocked door, as stated by my brother Roach, was not *per se* an unusual danger, and it must be taken that the

jury have declined to find fault with the condition of the premises behind the unlocked door. When the jury first returned with the answers made by them to the questions submitted by the learned judge, counsel for the defendant stated in their presence: "What I would like to have from the jury is whether, notwithstanding that there may not have been protection on the door, the lighting inside the stairway was not sufficient." The foreman of the jury then stated—"We discussed it." The jury were then instructed to clarify the answer made by them to question 4, and again declined to make any finding against the defendant in respect of the condition of the premises behind the door, notwithstanding the pointed and special reference to it by counsel for the defendant. It may be noted too, that the plaintiffs alleged that the defendant "knowingly permitted the existence of the said unlocked door in a position where it would be mistaken for the ladies' room thus constituting a further trap"; and that it "knowingly permitted inadequate lighting in the place of unusual danger". The jury have exonerated the appellant from liability in respect of those alleged acts or omissions: *Andreas v. The Canadian Pacific Railway Company* (1905), 37 S.C.R. 1, 5 C.R.C. 450.

I express the opinion that there was no breach of duty owing in law by the defendant to the plaintiffs which caused or contributed to the damages claimed in the action. The plaintiff wife was undoubtedly an invitee on the premises of the defendant. The duty owing by the defendant as occupier of the premises is stated by Willes J. in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 at 288 (affirmed L.R. 2 C.P. 311), as follows:

"And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know".

The duty of the defendants stated in other words in *Norman v. Great Western Railway Company*, [1915] 1 K.B. 584 at 594, 598, is this:

"... to take reasonable care that their premises were reasonably safe for persons using them in the ordinary and customary manner and with reasonable care."

I have previously said in *Pfister v. Toronto Transportation Commission*, [1946] O.R. 328 at 335:

"It is essential to the application of the rule [as quoted from *Indermaur v. Dames, supra*] that the invitee use reasonable care on his part for his own safety."

The jury have found that the plaintiff wife did not use reasonable care for her own safety in the circumstances. She "did not use proper caution in proceeding after opening the door". The negligence as found by the jury on the part of the defendant was *sine qua non*; the negligence of the plaintiff wife was *causa causans*. I therefore agree with the order proposed by my brother Roach. The appeal should be allowed with costs; the judgment in the court below should be set aside, and in place thereof the action should be dismissed with costs.

ROACH J.A. [after stating the facts as above]:—Before dealing with any of the arguments advanced by counsel for the appellant, the answers of the jury should be carefully considered.

By its answer to question 1, the jury has found that there was an unusual danger and that it caused the plaintiff's injuries. Then, with a paucity of words, in answer to question 2 the jury described that danger as an "unlocked door". Now an unlocked door is not *per se* an unusual danger. The dangerous condition, if one exists, consists in that which is found when the door is opened. Having regard to the pleadings, and the way in which this case was presented to the jury by counsel, as reflected by the learned trial judge's charge, and the charge itself, it must be concluded that what the jury had in mind was this, namely, that having regard to the proximity of the cellarway door to the ladies' room door, and all or some of the circumstances as I have related them in the statement of facts above, as to which there is no controversy, a patron of the theatre might easily mistake the cellarway door for the other, and that the condition behind that door was unusually dangerous.

Next, by their answers to questions 3 and 4 the jury has said, in substance, that having regard to that dangerous condition the defendant was negligent in two respects, namely, in not having a sign on the door adequately indicating that it did not lead into the ladies' room, and in not having it fastened to provide against a mishap such as was suffered by the plaintiff wife.

I now proceed to consider certain of the arguments of appellant's counsel. He contended that the finding of the jury, in its

answers to questions 1 and 2, was perverse and against the evidence. In my opinion, there was ample evidence upon which the jury could find that in the circumstances "the unlocked door"—with the meaning which I think must be attached to those words—constituted an unusual danger. I defer discussing the other part of question 1 and the jury's answer thereto, namely, whether that unusual danger caused the plaintiff's injuries, until I come to discuss another argument advanced by appellant's counsel, namely, that the plaintiff's negligence, as found by the jury, was ultimate and the sole cause of her injuries.

Counsel for the appellant relied upon the judgment of the Supreme Court of Canada in *Canadian National Railways Company v. LePage (Lesage)*, [1927] S.C.R. 575, [1927] 3 D.L.R. 1030, 34 C.R.C. 300, and the judgment of the House of Lords in *Walker et al. v. Midland Railway Company* (1886), 55 L.T. 489, 2 T.L.R. 450. The facts in those cases distinguish them from the case at bar.

The *LePage* case, which was a decision under the civil law of the Province of Quebec, differs from the case at bar, as I read the judgment, in these vital respects: First, that it was not reasonable to expect that anyone might mistake the door through which the passenger fell for the door leading to the men's toilet; and secondly, the landing inside that door was encased on three sides by the walls of the building and the door, with a floor space of 3 feet 10 inches in width between the door and the wall opposite, and the stairs descended from the right of the landing commencing at a point one to two feet to the right of the door. At p. 579, Rinfret J., delivering the judgment of the Court, put it thus:

"The question for Talbot [the deceased] was not whether there was anything to indicate to him that he should not use the door and stair-way, but rather whether there was anything to indicate to him that he might do so."

In the case at bar the combination of the sign "Ladies" projecting out from the wall in the immediate vicinity of the cellarway door and the word "Private" on the cellarway door could easily mislead a patron approaching from the west to mistake the cellarway door for the one leading into the ladies' room. The words "No admittance" on the cellarway door would have con-

stituted a warning; the word "Private", in the circumstances, might well be misleading.

In *Walker et al. v. Midland Railway Company, supra*, a guest at an inn at night was looking for a water closet, one or more of which opened off the corridor. He walked along the corridor and entered a dark service room which opened therefrom, although there was nothing indicating that it was a water closet. The unguarded well of a lift through which he fell was at the end of the room and he proceeded in the dark until he fell into it.

Another ground of appeal, as stated in the notice of appeal and as argued, was that the learned trial judge, having emphasized to the jury the necessity of considering whether the plaintiff wife might under the circumstances be justified in mistaking the cellarway door for the ladies' room door, did not at the same time or at any time adequately draw to their attention the "primary question as to whether the situation inside the cellarway door was or was not dangerous", and that such non-direction amounted to misdirection. There is no merit in that argument. The learned trial judge, having carefully, and, I think, accurately, having regard to the evidence, reviewed the description of the condition behind that door, said to the jury:

"Now then, did that situation constitute an unusual danger?" And later: "Was there any adequate notice to an invitee coming in there for the first time, knowing nothing of the situation, that it might be dangerous to pass through that door?" And again: "Was there any warning by notice which would bring the danger, if it was an unusual danger, to the attention of the invitee?" And again: "Its close proximity to the ladies' room door, the short space from the door frame to the stairs—was that aggravated even by the fact that the light was at the head of the stairs, as argued by counsel for the plaintiff? If that light had been off, and the light in the cellar only, would it have been less dangerous? These are matters for you to consider. Did that light just in that particular position have a tendency to dazzle just for the moment somebody coming in? It would only be a moment, while a woman or a man was stepping 24 or 28 inches, while he pushed the door open. This almost would have happened in the twinkling of an eye. Was the eye dazzled for that twinkling by that light? That is again for you to say."

The learned trial judge, in his charge to the jury, said: "It is a question for the jury to say whether reasonable care has

been taken by the occupier to warn an invitee who comes upon the premises in such manner as may be necessary—for example, by notice, by lighting, by guarding, by locking, by fastening or otherwise, as I said to you a little while ago.”

The learned trial judge there was using almost the identical words of Willes J. in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 at 288, affirmed (1867), L.R. 2 C.P. 311. Counsel for the appellant argued that by his use of that language the jury might have been given to understand that the defendant must take all the precautions therein described. The simple answer to that argument is found in the jury’s answers to questions 2 and 4. They found the defendant negligent in two respects only, which demonstrates that the jury was not in any way confused by the language adopted by the learned trial judge.

I come now to consider the answers of the jury to questions 5 and 6, by which they found the plaintiff wife negligent and defined her negligence. The plaintiffs have not appealed against those findings. I think that, subject to any questions as to credibility, had I been trying this case without a jury I would have inclined to the view that in the circumstances the lady was not negligent. As she put it in evidence, she “pushed on the door and went with the door”. This is the natural movement of a person opening a door with the intention of passing through it where there is nothing to indicate any danger in doing so. The edge of the landing was only 2 feet inside the door, and even if she looked down at the floor she would not discover the narrow space between the door frame and the edge of the landing until the door had opened a distance of between 12 and 15 inches, and even then she would have only a very limited view. However, there is the finding of fact by the jury and the plaintiffs have not appealed against it.

It seems to me that the jury’s answers to questions 5 and 6 amount to a finding that the plaintiff wife could have discovered the danger if she had looked, and that she should have looked. I am unable to put any other interpretation on those answers. It follows therefore that, notwithstanding the negligence of the defendant, the plaintiff wife was in reality the author of her own injuries. Her negligence was *causa causans*; that of the defendant was merely *sine qua non*. It is important to observe that the negligence assessed against the plaintiff wife was in her conduct *after* opening the door. In other words, after opening the door,

had she looked, she would have become aware of the danger. She should have looked, so said the jury—and therefore she should have been aware of the danger, and she is in no better position than if she had been aware of it and paid no heed to it.

There is here no room for the application of The Negligence Act, R.S.O. 1937, c. 115, for the simple reason that the defendant's negligence was not a contributing cause of the plaintiff's injuries.

The appeal should be allowed and the action dismissed with costs. The appellant should have its costs of the appeal.

Appeal allowed with costs and action dismissed with costs.

Solicitor for the plaintiffs, respondents: David James Walker, Toronto.

Solicitors for the defendant, appellant: Smily, Shaver, Adams, DeRoche & Fraser, Toronto.

[COURT OF APPEAL.]

Rex v Gibbons.

Criminal Law—Insanity—Issue as to Accused's Fitness to Stand Trial—Sufficiency of Evidence—Trial Judge's Charge to Jury—Review of Finding on Issue upon Appeal against Conviction—The Criminal Code, R.S.C. 1927, c. 36, ss. 19, 967.

It is of vital importance in the administration of justice that the accused, particularly in a capital case, should be mentally fit to stand his trial, and if there is ground for doubting his sanity at the time of the trial that doubt should be resolved by inquiry just as thorough as would be given to a defence of insanity at the time of the offence. It is open to grave question whether counsel for the accused, having the opinion of a psychiatrist, whom he proposes to call as a witness for the defence, that the accused is suffering from mental illness (which is present at the time of the trial as well as when the offence was committed), which counsel hopes to establish as a defence to the charge, is entitled to take it upon himself to enter upon the trial without directing the attention of the trial judge to the situation, so that, if the judge in his discretion so decides, the trial may not be entered upon until it has been determined that the accused is mentally fit to be tried.

Where it appears that not all the evidence bearing upon the question of the accused's fitness to stand his trial has been brought before the jury upon the trial of that issue, and it further appears that the jury were clearly confused as to the issue they were required to try, a new trial must be ordered, since it cannot be said that there was a fair trial if there remains a possibility that the accused, notwithstanding the finding of the jury, was not fit to stand his trial by reason of mental illness or insanity.

Per HOPE J.A.: Although there is no right of appeal from the verdict of a jury on an issue under s. 967 of The Criminal Code, nevertheless if that issue is decided, and a conviction is thereafter made, the proceedings on the issue are subject to review on the appeal against that conviction.

Per ROACH J.A.: Although there is no rule of law or practice so requiring, the Crown, in the interests of the due administration of justice, should give to the jury trying an issue under s. 967 the benefit of any evidence which it has touching that particular issue.

Criminal Law—Defence of Insanity—Charge to Jury—Onus on Accused.

Per LAIDLAW J.A.: It is misdirection for the trial judge to tell the jury that the defence of insanity must be "clearly proved" by the accused.

Per HOPE J.A.: The words "clearly proved" should not be used in this connection if, from the general tenor of his charge, there is a possibility that the jury may think that the onus on the accused in this connection is the same as, or comparable to, that upon the Crown to prove its case beyond reasonable doubt. *Clark v. The King* (1921), 61 S.C.R. 608; *Smythe v. The King*, [1941] S.C.R. 17; *Sodeman v. The King*, [1936] 2 All E.R. 1138, quoted and applied.

Criminal Law—Trials—Witnesses—Discretion of Crown Counsel—Witnesses whose Names on Back of Indictment Not Called by Crown at Trial.

Per HOPE J.A.: There is no rule requiring Crown counsel to call all the witnesses whose names appear on the back of the indictment, or to make them available for cross-examination, although they should be present in court and available for the defence to call if it wishes. *Rex v. Tilford*, [1936] O.R. 35; *Adel Muhammed El Dabbah v. Attorney-General of Palestine*, [1944] A.C. 156, applied.

Evidence—Confessions—Warning by Police—Form—The Criminal Code, R.S.C. 1927, c. 36, s. 684.

Per HOPE J.A.: The warning to be given by police officers before taking a statement from an accused need not be in the form set out in s. 684 of The Criminal Code, although the form generally used is very similar. *Rex v. Steffoff* (1909), 20 O.L.R. 103, applied.

AN APPEAL by the accused from his conviction for murder, by McRuer C.J.H.C. and a jury.

13th and 14th May 1946. The appeal was heard by ROBERTSON C.J.O. and HENDERSON, LAIDLAW, ROACH and HOPE JJ.A.

A. G. Slaght, K.C. (*Peter L. Slaght* with him), for the accused, appellant: Seven witnesses whose names were on the back of the indictment were not called by the Crown at the trial. Although Crown counsel said, "it is in order that the other witnesses on the indictment will be called if the defence wishes", defence counsel asked that they should be called as Crown witnesses, but the trial judge refused to direct this. The result was that these witnesses were not available for cross-examination by the defence.

The warning given to the accused before his statement was taken by the police did not follow the form set out in s. 684 of The Criminal Code, R.S.C. 1927, c. 36. It did not contain the concluding words of that form, which are designed to remove the effect of any antecedent promise or threat. It is true that the statement was not objected to by the defence at the trial, but it

was shown that the accused had been in a confused state of mind when he made his statement, because, having started it, he realized that he had made a mistake and requested that a new statement be started, whereupon the original one was torn up by the police.

The trial judge, by interrupting and rebuking Dr. Doyle while he was giving evidence, unduly minimized the effect of his evidence: *Rex v. West* (1925), 57 O.L.R. 446, 44 C.C.C. 109. The witness should have been permitted to state directly what his opinion was as to the accused's mental condition, based upon his interviews with him, and the evidence given at the trial and heard by the doctor. In particular, the trial judge should not have referred, in his remarks to Dr. Doyle, to the possibility of the accused having been "coached", which might have been interpreted as a reflection upon counsel conducting the defence.

The issue as to the accused's insanity at the time of the trial was not properly conducted. The only evidence on the issue was to the effect that the accused was unfit to stand his trial. The question, under s. 967, is whether the accused is "capable of conducting his defence" or "unfit to take his trial". The ability to instruct counsel adequately is only one element. The trial judge, in charging the jury on the issue, used words which might indicate that the sole test was whether the accused knew that he was being tried for murder. The jury were clearly confused, and the trial judge definitely mis-stated Dr. Doyle's evidence in one very important respect, as to the accused's ability to instruct counsel.

Evidence was given by Mrs. Ruddy, a sister of the accused, that other members of the family had been confined to mental hospitals. The jury should not have been told, in a disparaging way, that this was evidence only of insanity in "collateral" members of the family, as if it were of no importance in determining whether or not the accused himself was insane. Dr. Doyle's evidence, which is the only evidence on this point, seems to indicate the contrary of this suggestion. The jury's attention should have been drawn to the provisions of The Mental Hospitals Act, R.S.O. 1937, c. 392, and to the law as laid down in *Rex v. Brockenshire and Clarkson*, [1931] O.R. 806, 56 C.C.C. 340, [1932] 1 D.L.R. 156 [HENDERSON J.A.: the trial judge did not say that this evidence was to be disregarded; he merely drew the jury's attention to its weaknesses.]

The evidence as to the delusions from which, according to Dr. Doyle, the accused suffered was not properly put to the jury, and the whole effect of the charge was to minimize the defence, which was not properly presented to the jury: *Rex v. Dinnick* (1909), 3 Cr. App. R. 77; *Rex v. West*, *supra*, at p. 449; *Rex v. Keating* (1909), 2 Cr. App. R. 61; *Rex v. Warner* (1908), 1 Cr. App. R. 227.

The trial judge did not accurately instruct the jury as to the degree of proof required of the accused in establishing the defence of insanity, and did not point out the difference between the onus on him in this connection and that on the Crown to prove its case beyond a reasonable doubt. He should have told the jury that if they had a reasonable doubt as to the accused's sanity he was entitled to the benefit of that doubt. The cases are collected in Crankshaw's Criminal Code, 6th ed. 1935, pp. 31-2. We refer particularly to *Clark v. The King*, 61 S.C.R. 608, 35 C.C.C. 261, 59 D.L.R. 121, [1921] 2 W.W.R. 446; *Rex v. Megill*, 23 Sask. L.R. 299, 51 C.C.C. 377, [1929] 1 W.W.R. 470, [1929] 2 D.L.R. 279; *Smythe v. The King*, [1941] S.C.R. 17, 74 C.C.C. 273, [1941] 1 D.L.R. 497.

W. B. Common, K.C., for the Crown, respondent: The latest authority as to the proper procedure with respect to witnesses whose names are on the back of the indictment, but who are not called by the Crown at the trial, is *Adel Muhammed El Dabbah v. Attorney-General of Palestine*, [1944] A.C. 156, [1944] 2 All E.R. 139, which shows clearly that the Crown has a discretion, with which the Court will not interfere. I refer also to *Rex v. Tilford*, [1936] O.R. 35, 64 C.C.C. 356, [1935] 4 D.L.R. 691. What the trial judge did here was merely to inform defence counsel as to the legal position, and counsel did not press the matter.

The statement of the accused to the police was admitted at the trial without any objection whatever from the defence. The warning given was adequate, and that set out in s. 684 is prescribed for use at preliminary hearings, and has no application to a statement made to the police. The fact that the accused requested a correction and a new beginning, rather than indicating that he was confused, shows that his mind was working clearly.

The trial judge has a discretion as to the conduct of the trial, and this Court will not interfere unless his conduct results in a

mistrial. His rights in this respect are discussed in *Rex v. West*, *supra*, at p. 448. The interruptions here were legitimate, and could not result in a miscarriage of justice. [ROBERTSON C.J.O.: Was there not a danger, as a result of his comments during Dr. Doyle's evidence, of the jury misunderstanding the weight they could give to the accused's statements to the doctor?] Any possible misunderstanding in that respect was cleared up in the charge, but in any event all the statements made by the accused to Dr. Doyle were inadmissible, being merely hearsay. [HENDERSON J.A.: How could the issue of insanity be fairly tried if the expert witnesses were not permitted to state the basis of their opinions?] [ROBERTSON C.J.O.: The statements to Dr. Doyle were not put in as evidence of their truth, but only as proof of his state of mind.]

[ROBERTSON C.J.O.: The trial judge's remarks to Dr. Doyle seem to indicate that he thought the evidence should be directed expressly towards an expression of opinion as to whether or not the accused's mental state was within the rule in *McNaghten's Case* (1843), 10 Cl. & F. 200, 8 E.R. 718.] Yes, and surely that is correct.

The word "coached", in its context, was harmless; it clearly refers to a purely hypothetical case.

There was no suggestion by either counsel for the accused at the opening of the trial, or at any time before the close of the Crown's case, that the accused was not fit to stand his trial. The accused himself pleaded and said he was ready for trial. The issue was necessitated only by defence counsel's inadvertently asking questions as to the accused's mental condition at the time of trial. In view of all the circumstances, no weight could possibly be given to Dr. Doyle's answer as to the accused's ability to instruct counsel. [LAIDLAW J.A.: How could the jury find that the accused was fit to stand his trial when the only evidence on the issue was that he was insane?] That is not really the effect of Dr. Doyle's evidence. [ROBERTSON C.J.O.: Was not the trial judge in effect directing an issue as to what was virtually the sole matter to be determined under the plea of not guilty?] Except, of course, that the accused's mental condition must be shown at a different time. [ROBERTSON C.J.O.: The jury's obvious confusion at the end of the trial makes one doubt whether sufficient care was taken with this issue.]

The trial judge's final words to the jury, before they retired the second time, were a complete and correct statement of the law, and adequately cleared up any errors there might have been: Tremear's Criminal Code, 5th ed. 1944, pp. 1227-8. The slight error in repeating Dr. Doyle's evidence could not possibly have resulted in any miscarriage of justice on the issue.

The trial judge's comment in Mrs. Ruddy's evidence was adequate and justified. He merely pointed out the weakness of her evidence as to insanity in other members of the family.

The charge with respect to Dr. Doyle's evidence as to what the accused told him was correct. He was under no obligation to say that Dr. Doyle believed the accused. [ROBERTSON C.J.O.: There was never any thought of offering that evidence as proof of the facts stated by the accused.] What he said must mean that the statements by the accused to Dr. Doyle were not evidence that the accused believed them to be true.

The trial judge's charge as to delusions is clearly based directly on s. 19(2). There was nothing in the evidence to justify the hypothesis of any delusion, at the time of the shooting, that the accused needed to shoot in self-protection.

As to the degree of proof required, the leading case is *Clark v. The King*, *supra*, where there is a quotation from Tindal C.J. in *McNaghten's Case*, *supra*, containing the words "clearly proved". *Rex v. Megill*, *supra*, is clearly distinguishable on its facts: there the trial judge put things together in his charge in such a way that the jury must have been confused. In *Smythe v. The King*, *supra*, the trial judge definitely likened the burdens. It is not stated in any case that the trial judge must point out the distinction in this respect. [HOPE J.A.: The words "clearly proved" are quite acceptable under *McNaghten's Case*, but it would appear from the judgment of Anglin J. in *Clark v. The King* that they are not correct under s. 19 of The Criminal Code.] That is not a ground for the decision in the *Clark* case.

There has been no substantial wrong or miscarriage of justice in this case, and, even if the Court is of the opinion that there were irregularities at the trial, the appeal should be dismissed under s. 1014(2).

A. G. Slaght, K.C., in reply.

Cur. adv. vult.

30th May 1946. ROBERTSON C.J.O.:—This is an appeal from the conviction of the appellant on a charge of murder, before McRuer C.J.H.C. and a jury, at Pembroke, on 20th March 1946.

There seems to be no dispute, nor any ground for dispute, of the fact that the accused, intending to kill, shot Joseph Fitzmaurice, with whose murder he is charged. A statement of the accused put in evidence at the trial by the Crown, without objection from counsel for the accused, very plainly states the facts. The only defence suggested is insanity. Dr. Doyle, a psychiatrist of some experience, had examined the accused on two occasions, both in the month of March 1946, the alleged murder having been committed on the 1st day of February 1946. He was of the opinion that the accused is mentally ill. It must have been obvious to counsel who represented the accused at the trial (who was not the counsel appearing for him on the appeal) that the unsoundness of mind, or mental illness, that Dr. Doyle considered to be present at the time of his examinations of the accused, was, in the opinion of Dr. Doyle, equally present on the 1st February and at the time of the trial as well. Notwithstanding this, counsel for the defence permitted the accused himself to enter a plea of not guilty and to say that he was ready for his trial.

One may surmise that counsel had it in mind to take the chance of obtaining for the accused the benefit of a verdict of not guilty on the ground of insanity or disease of the mind, rather than to have the proceedings commence with the trial of an issue under s. 967 of The Criminal Code, R.S.C. 1927, c. 36, as to whether the accused was or was not then, on account of insanity, unfit to take his trial. In my opinion it is open to grave question whether counsel, having the opinion of a psychiatrist, whom he proposes to call as a witness for the defence, that the accused is suffering from mental illness or insanity, which he proposes to establish as a defence to the charge, is entitled to take it upon himself to enter upon the trial without directing the attention of the trial judge to the situation, so that, in his discretion, the trial may not be entered upon until it has been determined that the accused is mentally fit to be tried. Dr. Doyle, the psychiatrist, when called for the defence, made it quite clear that the unsoundness of mind of the accused to which he testified was present, in his opinion, throughout the period in question, and still persisted at the time of the trial. I find it difficult to conceive how counsel for the accused could

properly receive instructions from the accused as to a defence of insanity, if that insanity still persisted at the time of the trial.

The course of the trial was this: After the accused had pleaded not guilty and had said he was ready for his trial, and the jury had been called and sworn, six witnesses were called for the Crown, and the third and last witness for the defence, Dr. Doyle, was in the witness-box, when, by reason of the definite statement of the witness that, in his opinion, the accused was "mentally ill—insane", the learned Chief Justice of the High Court interfered and, against the objection of counsel for the defendant, directed an issue under s. 967. Being called upon then to proceed with the trial of the issue, counsel for the accused put Dr. Doyle in the witness-box, and he was examined and cross-examined as to his opinion upon the matter of insanity, the learned Chief Justice also asking the witness certain questions. No other witness than Dr. Doyle was called by either side on the trial of the issue, and the learned Chief Justice instructed the jury that they must come to a decision on the evidence that had been given on the issue, and that the only evidence was that of Dr. Doyle. In concluding his charge the learned Chief Justice said to the jury: "You are only trying whether he has sufficient intellect in the course of these proceedings to instruct counsel and thereby stand trial." Some of the observations upon the evidence of Dr. Doyle were not in entire accord with the evidence given, but no objection was made to the charge. The jury returned in five minutes to say that they did not know "exactly how to place this". The learned Chief Justice gave certain instructions to the jury, to which again counsel for the defence said that he had no objection, and the jury, after another absence of five minutes, returned with a finding that the accused was fit to stand his trial. It does not appear that either counsel addressed the jury upon the issue.

Now, there had been other evidence given in the course of the trial, so far as it had then proceeded, that a jury might reasonably have considered material in arriving at a conclusion in regard to the accused's mental condition and his fitness to stand his trial. There had been evidence given for the defence by a sister of the accused of a number of cases of insanity among the collateral relations of the accused. The same wit-

ness said further that, among themselves, they had discussed putting the accused in a mental institution by reason of certain conduct of his, which she described, and which might be taken as an indication of an abnormal mental condition. There was also evidence obtained upon cross-examination of witnesses for the Crown to the effect that the accused had, not long before the alleged murder, gone to the police asking for police protection, and on another recent occasion had asked for permission to carry firearms for his own protection, although there appeared to be no occasion for any such protection. One of the sisters of the accused also gave evidence that the accused had lately taken to locking up the house at night, contrary to their long practice of leaving the doors unlocked, and again the evidence indicated no reason for his conduct. These matters, if they had been put in evidence on the trial of the issue, might have been considered by the jury as materially supporting the opinion of Dr. Doyle as to the delusions from which, in his opinion, the accused was suffering, the delusions referred to being of the character that are sometimes called delusions of persecution.

The conduct of the accused in connection with the shooting of Joseph Fitzmaurice and of his brother, who was also shot on the same occasion, as given in evidence, and his conduct following thereupon, were also of a character that might have been regarded by a jury as some evidence of an insane mind.

I am not to be taken as expressing any opinion whatsoever as to the conclusion the jury should have come to if all the evidence that had been given before them that might reasonably be considered to bear upon the question of his fitness to be tried had been included in the evidence put before them on the trial of the issue under s. 967. I realize that the question of the accused's unfitness to be tried is not identical with the question whether he should be found not guilty of murder because of insanity. But where, as in this case, the defence of insanity is based upon the alleged existence of certain insane delusions which rendered the accused incapable of appreciating that in shooting Joseph Fitzmaurice he was committing a wrongful act, if that same state of insanity still persisted at the time of the trial, as in the opinion of Dr. Doyle it did, then it seems to me there is little distinction to be made between the evidence relevant to determine the question of the accused's fitness to be

tried, and the evidence relevant to the question of his guilt or innocence of the crime charged. It is impossible to conceive that a person afflicted by such delusions could properly instruct counsel for his defence based upon the existence of those delusions, and upon nothing else. The opinion of Dr. Doyle, who was the only witness upon the trial of the issue, is, as I read it, to this effect.

The learned Chief Justice more than once in the course of the trial expressed his embarrassment by the manner in which the case for the defence was being presented, and if this were anything other than a capital case I should hesitate before concluding that we could properly interfere with the result. Counsel for the defence at the trial appear to have been content with the result of the issue as to accused's fitness for trial. It is to be noted, however, that, having heard no further evidence for the defence than the completion of Dr. Doyle's evidence, and there having been called for the Crown in reply two psychiatrists of experience who expressed an opinion contrary to that of Dr. Doyle, the jury, having retired at 4.50 o'clock p.m., did not bring in a verdict until 10 o'clock p.m. Twice in the meantime they returned, asking for further instruction. On the first occasion the jury asked: "Will your Lordship explain again to us the law as to insanity? We have one French-speaking jurymen and he does not understand the big words." On the second occasion the foreman of the jury asked, "Did I understand you to say that shooting through fear was ground for insanity?" After some instructions upon that matter the foreman of the jury said, "I would like to have you explain about the grudge again." After some instruction upon that matter the foreman said, "We would like to have you explain that part of the law that you were explaining this afternoon, the law on insanity."

I find it impossible to escape the conclusion, when a jury, who took only five minutes to determine the issue in regard to the accused's fitness to stand trial, took five hours to determine whether insanity had been proved as a defence to the charge, that there was much lacking in the presentation to them of the first issue. It is of vital importance in the administration of justice that the accused, particularly in a capital case, should be fit to stand his trial. If there is ground for doubting his sanity at the time of his trial, that doubt should be resolved

one way or the other, by inquiry just as thorough as a defence of insanity would be given. That there was reasonable and even substantial ground for raising the question of insanity in the present case is, I think, shown by the obvious difficulty the jury met in reaching a verdict upon the whole evidence in the case. The possibility that this appellant was placed upon his trial while unfit to undergo trial by reason of mental illness or insanity, and that thereby a fair trial was not had, is the only ground, in my opinion, for interfering with the verdict and judgment. I think, in the circumstances of the case, it is a sufficient ground. An adequate inquiry to determine whether the appellant is fit to be tried should be made, and until it is made there can be no proper determination of his guilt. I would, therefore, set aside the conviction and direct a new trial.

HENDERSON J.A. agrees with ROBERTSON C.J.O.

LIDLAW J.A.:—I concur with my Lord the Chief Justice of Ontario. The trial of the issue whether the accused was or was not unfit to take his trial on account of insanity was not satisfactory, and the reasons stated so clearly and convincingly by my Lord leave my mind free from all doubt in the matter. I desire, however, to add my opinion that on the evidence adduced on the trial of that issue the jury could not reasonably or properly find that the accused was fit to stand his trial. The evidence of Dr. Doyle stands alone. In respect of the condition of mind of the accused at the time of the trial, Dr. Doyle stated, in part:

“I believe that he can instruct counsel merely as to the events that have occurred, but not as to the reasons behind them. The reasons for his own actions, I believe he will give erroneous answers.”

Dr. Doyle's opinion as expressed elsewhere in the evidence is not severable from the qualification to it, as above quoted, but on the contrary is subject to it. The qualification is of paramount importance and cannot be disregarded. In my opinion, the evidence did not leave two views open to the jury. There was only one possible finding on the evidence submitted for the consideration of the jury, namely, that the accused was unfit to take his trial. What the jury have done, in effect, is to substitute their opinion in the form of a finding in place of the expert opinion of Dr. Doyle.

I desire also to express my view on another matter which was the subject of argument in this Court. The learned judge instructed the jury that the defence of insanity must be "clearly" proved. I cannot draw a line of distinction between the onus of clearly proving a fact and the onus of establishing a fact beyond a reasonable doubt. The words "clearly proved" carry with them, to my mind, the meaning that the proof must be such as to overcome any reasonable doubt I might have in the matter. I would so apply the instruction contained in those words, that if I had a reasonable doubt I would conclude that the defence failed. Even if I were of the opinion that the weight of the evidence was in favour of the defence but nevertheless fell short of satisfying me clearly, I would decline to give effect to the preponderance of evidence. That would be a substantial injustice to the accused. He is not bound to prove the facts necessary to constitute a defence of insanity beyond a reasonable doubt. His burden is satisfied if he adduces a preponderance of evidence acceptable to the jury. I do not suggest that a trial judge must expressly distinguish the onus on the prosecution to prove the guilt of the accused beyond reasonable doubt from the onus resting on an accused who relies upon the defence of insanity, to prove the necessary facts to support that defence by a preponderance of evidence. If, however, as in this case, it appears that the jury might have proceeded on a wrong basis in reaching their verdict, there ought to be a new trial unless the Crown satisfies the Court that no substantial wrong or miscarriage of justice has been occasioned. I am not so satisfied. On the contrary, I am satisfied that the jury were in a state of doubt and confusion, and probably of misunderstanding. The course of proceedings shows that fact by the nature of their numerous requests for further instructions. On this ground also, I would set aside the conviction and direct a new trial.

ROACH J.A.:—I have had the benefit of reading the reasons of my Lord the Chief Justice, with which I entirely agree. I only desire to add this, that where, in the course of a trial, as here, the question of the mental fitness of the accused to stand his trial arises, as a matter of practice the Crown should give to the jury trying that issue the benefit of any evidence which it has touching that particular issue. If this is not done,

and the jury should declare on such evidence as it hears that the accused is fit to stand trial, and the trial continues and the Crown then places in the witness-box psychiatrists, as it did here, it is not beyond possibility that as a result of the evidence of those psychiatrists it might appear to the jury, notwithstanding their earlier verdict on the issue, that the accused was even then insane and not capable of conducting his defence. Such a possibility could be prevented, and it would savour much more of fairness, if, notwithstanding that no rule requires it, as a matter of practice, the Crown would, on such an issue, submit all the evidence at its disposal touching that issue.

HOPE J.A.:—This is an appeal against the appellant's conviction and sentence at Pembroke on the 20th March 1946, by the Honourable the Chief Justice of the High Court, with a jury.

The appellant was charged with the murder of Joseph Alan Fitzmaurice at the township of Admaston in the county of Renfrew, on or about the 1st day of February 1946. On his arraignment the accused personally entered his plea of "not guilty", and stated that he was ready for his trial. The trial commenced on Monday the 18th March and was concluded with the verdict and sentence on the 20th March.

Some of the grounds of appeal as set out in the statement of law and fact filed by the appellant's counsel were abandoned in the argument of the appeal. Those which were maintained are numerous, and will be dealt with as follows:

The first objection raised was that the learned trial judge had refused to allow Crown witnesses, whose names appeared on the back of the indictment and who were not called by the Crown at the conclusion of the case therefor to be called for examination by the defence counsel. What took place may best be explained by quoting from the transcript of the proceedings after the Crown had called five witnesses whose names did appear on the back of the indictment, there being ten other names thereon of persons who were not called as witnesses by the Crown. I quote from p. 64 of the evidence, as follows:

"MR. RIGNEY [Crown counsel]: My Lord, I should like to state that it is in order that the other witnesses on the indictment will be called if the defence wishes.

"MR. GALLIGAN [Defence counsel]: I think they should be called as witnesses for the Crown.

"HIS LORDSHIP: There is no law to that effect.

"MR. GALLIGAN: They were Crown witnesses and we could not approach them.

"HIS LORDSHIP: All the Crown is required to do is to have them available so that you may call them.

"MR. GALLIGAN: But, my Lord, we are not permitted to talk to them and ascertain what evidence they might give. In fairness to the defence, I submit that we should not put a witness in the witness-box without having some opportunity of ascertaining what that witness might know as to the case.

"HIS LORDSHIP: You are at liberty to communicate with them and find that out. I know of no power that I have to direct that a witness be put in the witness-box. The mere fact that a witness's name appears on the indictment does not put the Crown under any compulsion to call them, but they ought to have been available in the court-room so the defence may call them. Otherwise, I would have to grant an adjournment to give the defence the opportunity to *subpoena* them.

"MR. GALLIGAN: The only point to the matter, my Lord, is that we have been unable to approach these witnesses.

"HIS LORDSHIP: That may be. You will be under that handicap. I do not know of any rule that a defence counsel cannot interview a witness that may be called for the Crown. Their names were not on the indictment until yesterday, but because the Crown may call a witness, it does not interfere with the counsel for the defence interviewing that witness. The counsel for the defence may not attempt to influence the story that that witness may give. The mere fact that he interviews a witness in preparation of his defence has no effect upon the Crown. The Crown, by issuing a lot of *subpoenas*, cannot throw a cloud over a lot of witnesses, excluding the defence from the preparation of their case.

"MR. GALLIGAN: My Lord, may I have an adjournment of fifteen minutes in order to allow me to consult?

"HIS LORDSHIP: I will be glad to grant that, Mr. Galligan."

After a recess of twenty minutes the Court resumed, without any further explanation appearing on the record, and the defence proceeded to call as witnesses for the defence persons whose names were not on the indictment.

I cannot find that the trial judge was in any way in error in the manner in which he dealt with this question.

Somewhat the same situation arose and was discussed by the Court of Appeal in *Rex v. Tilford*, [1936] O.R. 35, 64 C.C.C. 356, [1935] 4 D.L.R. 691, when the late Chief Justice of Ontario, Sir William Mulock, at pp. 39-40, said thus:

"The following is the first ground of appeal:

"That the learned trial judge refused to require the Crown to call the only witness who received arsenic into the house, where it was said the deceased was poisoned. This witness alone knew what became of the arsenic and to whom she delivered it and her name was on the indictment. The learned trial Judge further refused to have the said witness called by the Crown that the defence might cross-examine her."

"The learned trial Judge ruled against that contention and the accused appeals from his ruling.

"We are of opinion that the ruling was correct, and the appeal therefore should be dismissed."

The same problem was more recently dealt with by the Judicial Committee of the Privy Council in *Adel Muhammed El Dabbah v. Attorney-General of Palestine*, [1944] A.C. 156, [1944] 2 All E.R. 139, in which, at pp. 167-8, Lord Thankerton stated.

"The last contention of the appellant is that he had a right to have the witnesses, whose names were on the information but who were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence, as was asked for by counsel for the defence at the close of the case for the prosecution. The learned Chief Justice ruled that there was no obligation on the prosecution to call them. The Court of Criminal Appeal held that the strict position in law was that it was not necessary legally for the prosecution to put forward these witnesses and that they could not say that the learned Chief Justice erred in point of law, but they pointed out that, in their opinion, the better practice is that the witnesses should be tendered at the close of the case for the prosecution so that the defence may cross-examine them if they wish, and they desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed in all courts. While their Lordships agree that there was no obligation on the prosecution to tender these

witnesses and, therefore, this contention of the present appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognizes that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive. No such suggestion is made in the present case."

The next objection raised by the appellant was that proper warning as set out in s. 684 of The Criminal Code was not given to the accused before the statement admitted in evidence at the trial was made by him to the police.

This objection must fail. The caution set out in s. 684 of The Criminal Code is specially prescribed only for use at preliminary inquiries: *Rex v. Steffoff* (1909), 20 O.L.R. 103, 15 C.C.C. 366, and is not required to be used by police officers, although in practice the form used by police officers is generally very similar to that given in s. 684. It has long been established as a positive rule of English law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him by either fear of prejudice or hope of advantage exercised or held out by a person in authority.

This principle, as stated by Lord Sumner in *Ibrahim v. The King*, [1914] A.C. 599, is as old as Lord Hale, and was quoted and adopted in *Prosko v. The King* (1922), 63 S.C.R. 226, 37 C.C.C. 199, 66 D.L.R. 340.

There is nothing to show that the statement procured by the police from the appellant in this case was not a purely voluntary statement in the normal acceptation thereof. In fact, the defence counsel, before its submission, advised the Court that he had seen the written statement and was not objecting to it.

The next ground of appeal raised by the appellant is that throughout the testimony of Dr. Doyle, the psychiatrist called on behalf of the defence, the learned Chief Justice presiding at the trial very frequently interrupted the examination of the witness with erroneous suggestions not based on evidence, and with erroneous rebukes—with the result that the jury could

not but be prejudiced against giving effect to the evidence of Dr. Doyle. Various instances were cited from the evidence in support of counsel's contention.

I am at a loss, however, so to assess any of such so-called interruptions, rebukes or comments in the manner ascribed by the appellant's counsel. It must be recognized that a trial judge has the right to question, even with leading questions, and to interrupt, if necessary, the examination of any witness. It would indeed be a peculiar and serious situation in any trial, if the contrary were to prevail.

In *Rex v. West* (1925), 57 O.L.R. 446, 44 C.C.C. 109, it was held that the judge has a discretion as to the conduct of the trial, and is entitled, if he thinks fit, to ask leading questions of the witnesses, to tell counsel that he is wasting time, and to suggest that counsel waive their right to address the jury; all these are matters of discretion, not to be interfered with on appeal unless manifest injustice is apparent; they do not of themselves constitute a denial of the right to make a full defence.

After a careful perusal of the evidence in the case at bar, I can find no grounds for even suggesting that the matters complained of by the appellant produced any manifest injustice in the conduct of the trial. This ground of appeal cannot succeed.

The appellant by his counsel took strenuous objection to the use of the word "coached" by the learned trial judge as it appears on p. 93 of the evidence when he stated during the examination of Dr. Doyle, the psychiatrist called on behalf of the defence, as follows:

"You are giving medical evidence now, and it is always difficult and sometimes confusing just to go in the witness box and relate everything that a man has said, because it leaves it open for this, that a man who is pretty well coached to tell his story to the doctor which the doctor relates in the witness-box, and then it is something that might entirely confuse rather than clear up the matter. If you can direct your mind to the very important question Mr. Galligan has asked from a medical point of view, that is all you can do."

It is clearly apparent from this quotation that the learned Chief Justice was putting to the witness a purely hypothetical case by way of illustrating the difficulties which arose in the

witness's narration of conversation with the accused. There was no suggestion at any time that the accused in this case had been coached by any one, and any inference from the above quotation is not justified.

The next ground of appeal arose out of the trial of the issue within the trial, *viz.*, as to whether or not the accused was, on account of insanity, incapable of conducting his defence and therefore unfit to take his trial. The provision of The Criminal Code covering this matter is set out in s. 967. No question was raised in respect thereto by the defence counsel or by the accused, and it is to be noted, as hereinbefore set out, that the accused personally pleaded to his arraignment and stated that he was ready for his trial. It did, however, appear to the Court during the examination in chief of Dr. Doyle, the psychiatrist called by the defence, that there was sufficient reason to doubt whether the accused was then, on account of insanity, capable of conducting his defence. When this situation arose, the jury which was trying the accused on the charge set out in the indictment was re-sworn to try the issue as to whether the accused was or was not then, on account of insanity, unfit to take his trial. The jury found that he was fit, and the trial was proceeded with.

Section 967 sets out the procedure to be followed in the event of the alternative findings of the jury on this issue. There is no provision within the Code which permits an appeal from the finding of the jury on this issue, but where, as a result of a finding on such an issue adverse to the accused person, a trial proceeds on a criminal offence and a conviction is found, then, in my opinion, a person so convicted would have a right to question the propriety of the proceedings on the trial within the trial, which had resulted in his conviction, on an appeal from that conviction, and therefore, while this Court now has no right as on an appeal to pass upon the question of the insanity of the accused at the time of his trial, yet the proceedings in connection therewith should be the subject of review at this time on the question of the conviction.

This preliminary charge of the learned Chief Justice presiding at the trial is brief, and may well be quoted in its entirety, namely:

"Gentlemen of the jury, there is no other evidence that anyone seeks to put before you in regard to that issue, so it is

your duty now on the evidence that has been given to find whether or not the accused, on account of insanity, is fit to take his trial.

"You must come to a decision on the evidence that has been given on this issue, and the only evidence is by Dr. Doyle, who was examined. We are not trying here whether or not the accused may be found not guilty on account of insanity, because there arises a very different question there that I must instruct you on, and you are not in a position to exercise judgment on that now.

"The only question you are asked to exercise your judgment on is whether there is evidence given in this issue, since you came in there and took the second oath, that would warrant you in saying that he is, because of insanity, unfit to stand trial; that he, by reason of a failure of his intellect, does not know what he is being tried for here.

"Dr. Doyle's evidence in regard to that is quite forward, so I think probably you may think you do not need to retire, but I think you had better retire and elect your foreman for this, and come back. If you need no further instructions, I will direct that you be taken to the jury-room, but remember you are not trying the main issue of whether he was sane or insane at the time the shooting took place. You are only trying whether he has sufficient intellect in the course of these proceedings to instruct counsel, and thereby stand trial."

Upon the completion of this brief charge, the jury retired and after five minutes returned, stating that they did not know "exactly how to place" this question, whereupon the judge further charged the jury:

"HIS LORDSHIP: Mr. Foreman, your answer should be no or yes. Your answer should be that the accused, if you find him, on account of insanity, is unfit to stand his trial, just say so. If you find that he is fit to stand his trial, just say so. Do you understand that? Do you want to retire again and consider it, or do you need to do that?

"Remember, you are only concerned with the evidence you heard of Dr. Doyle after you took your oath the second time. You are not concerned with the evidence that went before, because that is not through yet. You are only concerned with the evidence of Dr. Doyle. I will have the reporter read it for you. [The reporter then read the evidence.]

"HIS LORDSHIP: The last few questions are the real ones, as to whether he could comprehend what he is being tried for; whether he could understand what the witnesses say in the witness box, and whether he would be able to instruct counsel with regard to that, and whether he has sufficient intellect to follow just what is going on here.

"On all these matters, as I interpret Dr. Doyle's evidence, he has. He has given his medical opinion.

"We are here to try the matter on the evidence that he has given in the witness-box, and that is what Dr. Doyle has said in respect of that branch of the case. He has said that he believes he understands the proceedings sufficiently well to instruct his counsel and that he understands that he is being tried for murder by shooting with a rifle, and for the purpose of this we do not need to go any further.

"That by no means disposes of the broader issue concerning which Dr. Doyle has given evidence. That is not brought into this. This is narrowed down to the issue whether the man can understand the nature of the proceedings that are going on, comprehend the evidence, and be able to adequately instruct counsel. You will recollect that this was an issue that was raised by myself, and not by counsel for the defence.

"Will you retire now, and consider? You have only to state 'fit to stand his trial', or 'unfit to stand his trial by reason of insanity'."

The jury again retired, and returned in another five minutes with the verdict that the accused was fit to stand his trial.

Whatever may be said as to the paucity of instructions to the jury on the question of insanity in the earlier part of the learned judge's charge, I am of opinion that in the latter part of his re-charge the situation was fully covered, namely, "this is narrowed down to the issue whether the man can understand the nature of the proceedings that are going on, comprehend the evidence and be able to adequately instruct counsel." Having so instructed the jury, it is to be regretted, however, that the learned Chief Justice in his review of the evidence with respect to insanity, after expressing his own opinion that on the evidence as he interpreted it the accused was sane at the time of his trial, proceeded to state that Dr. Doyle had sworn that he believed the accused able to understand the proceedings sufficiently well to instruct his counsel. With all respect,

this was most misleading. Dr. Doyle's evidence on this point was as follows: (see p. 100, examination in chief):

"Q. You are of the opinion that he would be able to instruct counsel in regard to events that have been related on February 1st? A. I believe that he can instruct counsel merely as to the events that have occurred, but not as to the reasons behind them. The reasons for his own actions, I believe he will give erroneous answers."

And again, in cross-examination by Crown counsel:

"Q. What is your opinion, doctor, as to whether or not the accused to-day is fit to plead to the charge of which he stands indicted? A. I am sorry not to answer your question immediately and directly. I frankly do not know what the status in law is 'being fit to plead', or I am confused as to how to answer it.

"Q. It may be said to be the same as the answer you gave my friend. The answer that you gave my learned friend was that he was capable of instructing counsel? A. Yes; except for one qualification that I made."

It is quite apparent from the learned judge's charge that he failed to draw the attention of the jury to this very important qualification as to the accused's capacity of instructing counsel or conducting his defence.

While this Court cannot, on this appeal, disturb the verdict of the jury on the trial of the issue within the trial, nevertheless it is my opinion that the instructions given to the jury at that time may have had a very important part in influencing their verdict in the subsequent trial of the indictment, and to that extent any misdirection or misquotation of the evidence, however inadvertent, must not be lost sight of ultimately.

The other grounds for appeal deal with the main charge to the jury. It is argued that the learned judge did not sufficiently analyze the evidence offered on behalf of the defence, particularly that of the witness Mrs. Ruddy. There is no compulsion in law upon a trial judge to examine in detail all of the evidence given by various witnesses, and he may express his opinion upon the evidence and the conclusions to be reached from it, provided he makes it clear to the jury that they are not compelled to accept any suggested finding of fact by him and that theirs is the sole duty to find the facts of the case.

In this case, after a careful review of the charge, I am of opinion that the learned judge adequately reviewed the evidence without laying undue stress upon either that in favour of the theory of the defence or contrary, and I do not think that the verdict should be disturbed on this ground, save for the fact that the learned judge in his charge tended to minimize the evidence of the psychiatrist that mental disease in collateral relatives of the accused might have a material bearing on the question of his insanity.

The final and possibly the main objection of counsel for the appellant to the charge of the learned judge was that the learned judge had failed properly to instruct the jury as to the law governing the onus of proof resting upon the accused in support of a defence of insanity. Reviewing the judge's charge, we find that he first, in dealing with the onus which rests upon the Crown in a criminal prosecution, stated as follows:

"In all criminal cases the onus of proof, as we call it, the duty of proving the case, is always on the Crown, and the Crown must prove it beyond a reasonable doubt. That means that the Crown must adduce evidence to show that the accused did acts which are charged that would create the offence in law. That must be shown beyond a reasonable doubt. In applying that directly to this case, the onus is on the Crown in this charge to show that the accused killed Joseph Fitzmaurice intentionally, and about that there is no question raised by counsel for the defence or counsel for the Crown. In respect of the defence that is raised I shall deal with the law in regard to that in greater detail in a few moments."

It may be argued that this final sentence may have linked up in the jury's mind the question of the onus which rests upon the Crown with the question of onus resting upon the defence so far as the defence of insanity is concerned in the light of subsequent instructions.

Later in his charge, he said:

"I must tell you, as a matter of law, that every man is presumed to intend the natural consequences of his acts, and I also tell you, as a matter of law, that every man is presumed to be sane and to possess a sufficient degree of reasoning to be responsible for his crimes until it is proved to your satisfaction that he is not.

"Gentlemen, that is not an onus that is on the Crown. The law presumes in this case that the accused is possessed of a sufficient degree of reasoning to be responsible for his crimes until it is proved to your satisfaction that he is not. The proof is a defence. It is not part of the onus that the Crown assumes to prove that the man was sane at the time he committed the act . . . It must be clearly proved that at the time of the committing of the act the accused was labouring under such defect of reasoning from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. Gentlemen, every word that I have said there is important, and may I repeat them to you. It must be clearly proved", etc.

Later the learned judge repeated: "The onus on this issue is on the defence; it is not on the Crown. The defence must satisfy you on one or other proposition that I have put to you . . . If the evidence falls short of that, your duty is clear as crystal in this case."

Subsequently, just towards the end of his charge, these words appear:

"The onus is on the defence to satisfy you that the accused was, by reason of disease of the mind, incapable of understanding the nature and quality of the act, as I have explained it to you, or knowing that it was wrong."

The jury retired and after deliberation of two and a half hours, returned, asking the judge to explain again the law as to insanity. In proceeding to do so the learned judge stated:

"In the first place, it is a defence that must be proven by the defence. The defence must make it out . . . It must be clearly proved. . .

"I think it can almost be simplified in this way: that should you be satisfied on the evidence that the accused is suffering from a disease of the mind to the extent that he did not know that the act he was doing was a wrongful act, that would be a defence."

The jury then retired and after further deliberation of almost an hour, returned with a question by the foreman to the judge:

"Q. Did I understand you to say that shooting through fear was ground for insanity?"

Further the foreman asked for an explanation about the grudge and finally for an explanation of that part of the law

that the judge had explained to them in the afternoon, the law of insanity.

It is quite evident that there was considerable confusion in the minds of the jury as to the law which was applicable with respect to the defence of insanity, and with all respect to the trial judge I think it is understandable that the jury may have failed to appreciate the nature of the onus of proof which rests upon the defence with respect to a defence of insanity and may well have confused this onus with the type of onus which must be satisfied by the Crown in overcoming the presumption in law of the innocence of the accused person, namely, beyond a reasonable doubt.

No definition of what was meant by the term "beyond a reasonable doubt", with respect to the onus upon the Crown, was given to the jury.

The question of a judge's charge with respect to the onus resting upon the defence in proving a defence of insanity was originally and extensively dealt with by the Supreme Court of Canada in *Clark v. The King*, 61 S.C.R. 608, 35 C.C.C. 261, 59 D.L.R. 121, [1921] 2 W.W.R. 446, which was more recently confirmed by the same Court in *Smythe v. The King*, [1941] S.C.R. 17, 74 C.C.C. 273, [1941] 1 D.L.R. 497. In each of these cases the misdirection to which exception was taken was the use of the term "beyond a reasonable doubt" in conjunction with the question of onus resting upon the defence. In the case at bar the learned trial judge has not at any time used this objectionable phrase, but has on three different occasions used the phrase "it must be clearly proved".

In the *Clark* case, Duff J. states, at p. 621:

"... that the jury should be told that insanity must be clearly proved to their satisfaction but that they are at liberty to find the issue in the affirmative if satisfied that there is a substantial, that is to say, a clear preponderance of evidence."

This judgment was concurred in without reasons by Brodeur J., but Anglin J., after a review of the English law in relation to the provisions of s. 19(3) of The Criminal Code, points out at pp. 623-4:

"It does not suffice in English law that a defendant pleading insanity should create a doubt as to his sanity in the minds of the jury. He must prove his irresponsibility 'to their satisfaction'—it must be 'clearly proved'. So said Lord Chief Justice Tindal,

speaking for himself and his fellow judges." (*McNaghten's Case* (1943), 10 Cl. & F. 200 at 210, 8 E.R. 718).

Anglin J. continues at p. 624:

"On the other hand our Parliament has seen fit in s. 19(3) of The Criminal Code to define the law which is to govern Canadian courts in these terms:—

" 'Everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.' "

"It is noteworthy that, although the codifiers undoubtedly had the language of *McNaghten's Case* before them, our legislators have not said that, in order to overcome the presumption of sanity, mental irresponsibility must be 'clearly proved' or even that it must be 'established to the satisfaction of the jury'—but merely that it must be 'proved.' "

The judgment then continues to point out the difference between our statutory law and that of England, as "perhaps not devoid of significance", in the result which flows from a finding of insanity with respect to the charge upon which an accused appears.

At p. 625, Anglin J. continues as follows:

"No doubt, however, 'proved' in subsection 3 of section 19 of our Code must mean 'proved to the satisfaction of the jury,' which, in turn, means to its reasonable satisfaction . . . It may possibly have been meant to cover the phrase 'clearly proved' used in *McNaghten's Case*. 'Clear and positive proof,' however, was held in an Indian case cited in Stroud's Jud. Dict. (2 ed.), 323 . . . to mean 'such evidence as leaves no reasonable doubt.' If the adverb 'clearly' adds to the force of the participle 'proved' its use, in my opinion, is not warranted under our Code."

The judgment again continues:

" 'Proved' is not a word of art . . . Here I find nothing to warrant requiring evidence of greater weight than would ordinarily satisfy a jury in a civil case that a burden of proof has been discharged—that, balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant them as reasonable men in concluding that it had been established that the accused when he committed the act was mentally incapable of knowing its nature and quality . . . or if he did know it, did not know that he was doing what was wrong. That I believe to be the law of Canada . . . "

In the same case Mignault J. in a review of *McNaghten's Case* and the two Canadian cases, *Rex v. Kierstead* (1918), 33 C.C.C. 288 and *Rex v. Anderson* (1914) 7 Alta L.R. 102, 22 C.C.C. 455, 5 W.W.R. 1052, 26 W.L.R. 783, 16 D.L.R. 203 concludes his judgment with these words:

"I would therefore think that a proper direction would be to call the attention of the jury to the legal presumption of sanity and to inform them, the onus being on the accused, that insanity must be proved by him to their satisfaction. *Further than that I would not go.*" (The italics are mine.)

If I am correct in my reading of the judgment of Mignault J., I think it must be taken that in the last sentence which I have quoted above he emphatically endorses the opinion expressed by Anglin J. more succinctly and *in extenso*, with reference to the objectionable use of "clearly". Moreover, it is to be noted that in the subsequent case in the same Court, *viz.*, *Smythe v. The King*, *supra*, Mr. Justice Duff, who had then become Chief Justice of the Court, states thus:

"It was settled by the decision of this Court in *Clark v. The King*, that where a plea of insanity is advanced on a trial for murder the law does not require the accused, in order to succeed upon that issue, to satisfy the jury that insanity has been proved beyond all reasonable doubt; it is sufficient in point of law if insanity is proved to the reasonable satisfaction of the jury.

"The law, for reasons of policy which are well understood, draws a distinction as to the sufficiency of the evidence required to establish the affirmative of the issue of guilt or innocence in criminal proceedings, and that which is generally required as the basis of decision in civil cases . . .

"It is the rule that prevails generally in civil cases, as this Court decided in the case above mentioned, which governs the jury in determining the issue raised by a plea of insanity."

I think it is not without significance that the learned Chief Justice in his judgment, while not particularly referring to his own earlier judgment in the *Clark* case, in which he uses the term "clearly proved", speaks of the general policy of the law with respect to proof as dealt with by Anglin J. in his judgment in the *Clark* case, and more definitely stresses the rule with respect to onus which prevails in a civil case as being the true

rule applicable to the onus on the accused advancing a defence of insanity.

To demonstrate the last statement quoted above, the learned Chief Justice quotes as follows from Best on Evidence, 12th ed. 1922, p. 82:

"There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter . . . a much higher degree of assurance is required. The serious consequence of an erroneous condemnation, both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilized nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty . . ."

Further, it is of interest to note that in the more recent case of *Sodeman v. The King*, [1936] 2 All E.R. 1138, the Judicial Committee of the Privy Council discussed the question of the onus resting on an accused under the English Trial of Lunatics Act, as to a defence of insanity. The following comment, at p. 1140 is, in my opinion, particularly helpful in connection with what is required to overcome the presumption of sanity under s. 19(3) of our Code:

"... the suggestion made by the petitioner was that the jury have been misled by the judge's language into the impression that the burden of proof resting on an accused to prove insanity is as heavy as the burden of proof resting upon the prosecution to prove the facts which they have to establish. In fact there is no doubt that the burden of proof for the defendant is not so onerous . . . it is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings."

The adverb "clearly" must in the mind of the average man imply a much greater degree of probative evidence when linked with the participle "proved" than the word "proved" alone as used in s. 19(3). The adjective "clear" is defined in Murray's new English Dictionary, *inter alia*, as meaning "free from doubt". If a matter therefore is "free from doubt" it comes

perilously near to indicating that a degree of proof is required not far removed from "beyond reasonable doubt".

It may well be that had the learned judge's charge more fully dealt with the question of onus, which is required of the accused in this matter, namely, a mere preponderance of probability, then the danger from the use of the phrase "clearly proved" might have been removed. As it is, taking the charge as a whole, in conjunction with the earlier charge, on the trial of the issue within the trial, I feel that the language was calculated to confuse the jury as to the important point of the sufficiency of evidence in relation to the issue of insanity. They may very well have got the impression that the existence of insanity must be demonstrated in the sense in which the guilt of the accused must be established, *i.e.*, beyond reasonable doubt.

Although, as I have indicated in my opinion, many of the grounds of appeal fail, yet on this more important ground and in the light of the evidence, I feel that the jury had not the benefit of that full and clear instruction which would properly assist them. Such being the case, I am of opinion that the appeal must be allowed and that there should be a new trial.

I have considered the alternative disposition which might be made of this case by this Court by exercising the powers granted by s. 1016(4) of The Criminal Code, and in some circumstances I would be prepared to assume the responsibility of exercising that power in a case such as this, but with all respect to the counsel engaged herein, I fear that the question of the accused's insanity was not adequately explored in the way of evidence which would warrant this Court in assuming, on the evidence now before us, to exercise the powers of directing a verdict, nor should it be considered for one moment that by so expressing my views I am suggesting that the verdict of the jury as to the sanity of the accused at the time of the commission of the offence might not be fully warranted.

New trial ordered.

Solicitors for the accused, appellant: Slaght, Ferguson, Boland & Slaght, Toronto.

Solicitor for the Crown, respondent: C. L. Snyder, Toronto.

[ROBERTSON C.J.O.]

Re The Securities Act and Morton.

Securities—Registration—Functions and Duties of Ontario Securities Commission—Review of Registrations under Former Acts—Appeals—The Securities Act, 1945 (Ont.), c. 22, ss. 10, 47, 82 (as amended by 1946, c. 86, s. 10).

The relationship of the Ontario Securities Commission to brokers and salesmen on the register does not resemble that between the governing body or discipline committee of a club or society, such as the Law Society, and its members. The powers of the Commission, the occasions on which it may proceed, and the grounds upon which it should act, are those stated in the statute. Under s. 10 it must suspend or cancel a registration where, in its opinion, such action is in the public interest. A registered broker or salesman has no vested interest that is to be weighed in the balance against the public interest, and it is only the public interest that is to be served, and not private interests, or the interests of any profession or business.

The statute does not require that any complaint or charge shall be laid against a registered broker or salesman to entitle the Commission to inquire into the propriety of continuing any registration that has previously been made. By s. 82, as amended in 1946, there is imposed upon the Commission, in distinct terms, the duty of reviewing, as soon as may be, such registrations as were made under previous Acts and continued in force under the present Act, and this duty requires that the Commission, on such a review, should suspend or cancel any registration that it would not sanction to be made if an application for registration were before it.

The Court is authorized, under s. 47, to entertain an appeal, and to direct the Commission to act as the Court deems proper, having regard to the material and submissions before it and to the provision of the Act and regulations made thereunder. The very terms of s. 10 show that the Commission has a wide discretion in respect of the suspension or cancellation of any registration, and it is an established principle that an appellate Court should not lightly disregard the exercise of such a discretion and substitute its own.

AN APPEAL from a ruling of the Ontario Securities Commission.

21st May 1946. The appeal was heard by ROBERTSON C.J.O.

D. L. McCarthy, K.C., and *G. A. Martin, K.C.* for the appellant.

C. F. H. Carson, K.C., counsel designated by the Attorney-General under s. 46(4) of the Act.

31st May 1946. ROBERTSON C.J.O.:—This is an appeal pursuant to s. 46 of The Securities Act 1945 (Ont.), c. 22, from a decision, order or ruling pronounced by the Ontario Securities Commission on the 27th February 1946, cancelling the registration of the appellant as a salesman.

The appellant had been at one time, when under the age of twenty-one years, registered as a broker under The Securities Act then in force. In 1935 he was convicted on a charge of obtaining money by fraud from a customer, and following upon

that conviction his registration as a broker was cancelled. Subsequently, in 1942, he applied for registration as a salesman, and that application was granted. He continued to be registered as a salesman with a succession of brokers, the last being Redman & Co. In January 1946 the appellant applied to have his registration as a salesman transferred from Redman & Co. to John F. Burgess & Co. This transfer, the registration of which was essential to his continuing to act as a salesman when his connection with Redman & Co. had ended, was refused and the Chairman directed the cancellation of his registration. Thereupon the appellant applied to be heard by the Commission, by way of appeal from the decision cancelling his registration. It is from the decision of the Commission made on the hearing of that appeal under s. 45 of the Act, that the present appeal is taken.

Objection was made on behalf of the appellant that notice had not been given to the appellant of the grounds upon which his registration had been cancelled. I find, however, upon p. 14 of the transcript of evidence taken before the Commission, that counsel for the appellant refers to a memorandum which had been given to him by an officer of the Commission, as a statement of the basis upon which the appellant's licence was cancelled. Nowhere do I find in the record any objection by counsel that the appellant had not been sufficiently informed of the grounds upon which his registration had been cancelled.

For the appellant it is also objected that he had no opportunity to be heard before cancellation of his registration. The papers before me are not a complete record of the proceedings, and I do not know what, if any, hearing was had before notice was given to the appellant by the registrar's letter of 21st January 1946, that his registration had been cancelled. Again, I see no record of any complaint on the part of the appellant, in the proceedings before the full Commission, that there was any fault to be found with the earlier proceedings, except their result. He launched his appeal to the Commission and proceeded with the hearing of it, represented by counsel, and I think I must assume the regularity of the proceedings antecedent to the appeal, in the absence of evidence to the contrary. The appellant had a full hearing of his case before the Commission, and I shall deal with the case as it was there presented.

It is important to appreciate the relation in which the Commission stands to the brokers and salesmen on the register. Arguments were addressed to me based upon the assumption that that relationship, at least in so far as disciplinary measures are concerned, resembled that of the governing body or discipline committee of a club or a society, such as the Law Society. No doubt, there are principles of natural justice that should be observed in proceedings under the provisions of The Securities Act, 1945, that relate to the suspension and cancellation of registration, but the powers of the commission and the occasions when it may proceed, and the grounds upon which it should act, are those stated in the statute. The Commission is to suspend or cancel a registration where, in its opinion, such action is in the public interest: s. 10. A registered broker or salesman has no vested interest that is to be weighed in the balance against the public interest. I have no doubt the Commission will, on proper occasions, give consideration to the possible serious consequences of taking away a man's livelihood, and of making the business of a broker or salesman a precarious occupation. Such considerations may have their proper place in determining what is in the public interest. It is, however, the public interest that is to be served by the Commission, and not private interests or the interests of any profession or business, in the exercise of the Commission's powers of suspension or cancellation of the registration of any broker or salesman.

The statute does not require that some complaint or charge shall be laid against a registered broker or salesman to entitle the Commission to inquire into the propriety, in the public interest, of continuing any registration that has been made. The Commission have imposed upon them, in distinct terms, the duty of reviewing, as soon as may be, such registrations as were made under The Securities Act previously in force, and as were continued in force under the present Act. Section 82 of the Act, as amended by 1946, c. 86, s. 10, is as follows:

"82. Every registration in force under *The Securities Act* at the date of the coming into force of this Act shall continue in force as a registration under this Act and subject to the provisions thereof but shall be reviewed by the Commission as soon as may be notwithstanding any renewal of such registration under this Act."

In my opinion the duty so imposed upon the Commission to review former registrations requires the Commission to inform itself of the propriety of such registrations, and to exercise such judgment and discretion in respect thereof as would be proper in the case of an application to be registered. The Commission, therefore, was proceeding in the normal discharge of its duties in reviewing the registration of the appellant as a salesman without having before it any specific charge or complaint, and in considering whether he was properly on the register.

The evidence before the Commission shows that in January 1935 the appellant, while registered as a broker, was convicted of a criminal offence, as hereinbefore stated, and although the appellant, in his evidence, disputes the validity and fairness of his conviction, and says that he had instructed an appeal to be taken, for which funds were made available to his legal representative, but that the appeal was not taken owing to the latter's default, yet the Commission, in their reasons for judgment, say that they do not propose to review the sentence of a court of competent jurisdiction. I find nothing to criticize in this attitude of the Commission in respect of that conviction. The Commission recognize that the conviction was made many years before, when the appellant was only twenty years of age, and do not make the fact of that conviction by itself the ground for cancellation of the registration of the appellant.

The Commission further inquire into the business activities of the appellant after the date of that conviction, and, in the opinion of the Commission, they were not furnished with the information in that regard that should have been made available, particularly in respect of the period from 1939 to 1942. In December 1942 the appellant was registered as a salesman under The Securities Act then in force. It appears in evidence that in the period since December 1942 the appellant was brought before the Commissioner under The Securities Act on 6th July 1943 in connection with a complaint that the appellant had telephoned the complainant, endeavouring to sell him certain gold-mining stock, and that although the complainant had not given the appellant any order, he received from the appellant what purported to be a confirmation of the sale of 500 shares. The memorandum made by Mr. Whitehead, who was then Com-

missioner, was to the effect that there was a direct conflict of evidence between the complainant and the appellant, and that the Commissioner gave the appellant a stern warning that any repetition of similar complaints would be drastically dealt with by the Commissioner. It also appears by the evidence given before the present Commission that there have been somewhat frequent changes of the brokers with whom the appellant was employed after his registration as a salesman in December 1942. The Commission do not specifically refer to that circumstance in their judgment.

The appellant gave evidence in person before the Commission, and the Commission were afforded that opportunity to judge the appellant's qualifications. In concluding their judgment the Commission, after commenting that there is nothing tangible tending to offset his otherwise unsatisfactory record, proceed as follows:

"His personal characteristics do not assist his cause; on the contrary they invite caution in dealing with a person who managed to obtain a broker's licence at the age of sixteen. He has ability of a kind, which if directed in the wrong direction would be a serious menace to the public. There is no real evidence that it has ever been fully directed in the right direction. We cannot, on the strength of the material before us, take the grave responsibility of continuing his registration."

This Court is authorized and directed to hear an appeal from the direction, decision, order or ruling of the Commission, and to direct the Commission to make such direction, decision, order or ruling, or to do such other act as the Commission is authorized and empowered to do under the statute or the regulations, and as the Court deems proper, having regard to the material and submissions before it and to the provisions of this Act and the regulations: s. 47. The very terms of s. 10 of The Securities Act, 1945, indicate that, in respect of the suspension or cancellation of any registration, the Commission is given a wide discretion. It is an established principle of wide application that an appellate Court should not lightly disregard the exercise of such a discretion and substitute its own. The statute does not require evidence of actual misconduct or default on the part of a person registered, to justify the Commission in exercising its powers of suspension or cancellation under s.

10. The duty imposed upon the Commission by the amended s. 82, to review the registrations made under an earlier Act, in my opinion, requires, in substance, that the Commission, on a review, should suspend or cancel any registration that they themselves conclude they should not sanction to be made if an application to register were made to them. I do not think the Commission are placing the requirements of their statutory duty too high when they refuse approval of the registration of one as to whose past conduct and present fitness they are not satisfied by the evidence before them. In my opinion to allow the appeal would be an unwarrantable interference with the exercise by the Commission of the powers and discretion that the statute has vested in them.

The appeal will, therefore, be dismissed.

Appeal dismissed.

Solicitor for the appellant: G. A. Martin, Toronto.

Solicitor for the Ontario Securities Commission: T. P. O'Connor, Toronto.

[WELLS J.]

Sutton and Sutton v. Vanderburg.

Injunctions—Mandatory Interlocutory Injunction—Action for Possession of Land—Vendor Remaining in Possession.

The plaintiffs purchased a house from the defendant, the offer to purchase containing a term that adjustments were to be made as of 1st April 1946, and that the defendant should be entitled to remain in possession until that date. The deed was executed and registered in February 1946, and the purchase-price was paid in cash. The defendant did not vacate on 1st April, and the plaintiffs issued a writ, claiming possession, an injunction and damages. They then applied for an interlocutory injunction restraining the defendant, until trial, from remaining in possession.

Held, the plaintiffs were entitled to the order sought. Although the remedy was an extraordinary one, and should be granted only in a clear case, this was such a case. The plaintiffs were clearly entitled to possession, the defendant having failed to establish any arrangement entitling him to remain after 1st April. The action could not be tried for several months, and damages would clearly be inadequate compensation if the plaintiffs were kept out of possession in the meantime. *Collison v. Warren*, [1901] 1 Ch. 812; *Pratt v. Scheveck* (1926), 21 Sask. L.R. 154, applied.

Held, further, the order should not be in the negative form asked for in the notice of motion, but should be a mandatory order, directing the defendant to deliver up possession of the premises to the plaintiffs. *Jackson v. Normanby Brick Company*, [1899] 1 Ch. 438, applied.

A MOTION for an interlocutory injunction.

27th May 1946. The motion was heard by WELLS J. in Weekly Court at Toronto.

W. J. Smith, for the plaintiffs, applicants.

J. W. Graham, for the defendant, *contra*.

6th June 1946. WELLS J.:—This is an interlocutory application on behalf of the plaintiffs for an injunction restraining the defendant "from remaining in possession of the premises" known as 141 Richard Street, in the city of Sarnia, described as "being composed of the west twenty-four feet (24') from front to rear of Lot Sixty-two (62) and the easterly fourteen feet (14') from front to rear of Lot Number Sixty-three (63) on the south side of Richard Street, according to Plan registered in the Registry Office for the Registry Division of the County of Lambton, as Plan Number Seventy-seven (77) for the said City of Sarnia".

A writ was issued on behalf of the plaintiffs in this Court on the 2nd day of May last. I am not told whether an appearance has been entered or not, and apparently no pleadings have been delivered. The claim endorsed on the writ is for possession of the premises, as above set out, for an injunction restraining the defendant from remaining in possession of the premises, and for damages. The application originally came up for a hearing on the 16th May, and, at the request of the defendant, was adjourned until the hearing on the 27th May. During this period a further affidavit was filed on behalf of the defendant in reply to the affidavit of Mr. J. R. Logan, but no examinations in respect of the affidavits have taken place. The facts, as one can spell them out from the affidavits, appear to be that the defendant Roy Vanderburg advised his solicitor, Mr. J. R. Logan, that his house at 141 Richard Street, Sarnia, was for sale, as he was moving to Petrolia. The plaintiffs, who were selling a farm owned by them, were desirous of moving to Sarnia. The solicitor, Mr. Logan, acted for both parties. He advised the plaintiffs that the defendant's house was to be for sale. After some negotiations through the solicitor an offer was made, which was reduced to writing, and was signed by the plaintiffs. The offer was communicated to the defendant, and, according to Mr. Logan, was accepted by him verbally, but he did not sign an acceptance of the offer, apparently through Mr. Logan's oversight. The solicitor, however, was instructed to draw a deed to the plaintiffs, and the defendant and his wife signed the same, and the deed

was delivered and the transaction was closed in accordance with the offer signed by the plaintiffs and submitted to the defendant. The deed is dated 23rd February 1946, and was registered in the Registry Office for the County of Lambton on the 25th February 1946. There was no definite date given for possession in the offer as written, but it was provided that,—

“Taxes, Insurance and Water Rates are to be adjusted to April 1st, 1946. You are to have possession of the house rent-free until April 1st, 1946.”

Adjustments were drawn as of the 1st April and the balance due to the vendor, the present defendant, of \$5,531.45, was paid over by the plaintiffs to him. Relying on these arrangements, the plaintiffs sold their farm property, agreeing to give possession to the purchasers from them on the 1st May 1946. The defendant, not having secured accommodations in the village of Petrolia, did not deliver up possession of the premises on the 1st April or on the 1st May, and has not yet delivered possession. An endeavour was made by the plaintiffs to obtain possession of the premises on Monday the 29th April, at which time the defendant threatened to have the plaintiffs arrested. Mr. Logan swears that the defendant told him that he had got the house in Petrolia and would be out by the 1st April. The first time, he says, that he heard of Vanderburg's refusal to give up possession was when the plaintiffs came to him in some excitement, toward the end of April, stating that Vanderburg had refused to let them in with a load of fuel, but had permitted them to store some wood they were moving, in the garage.

Roy Vanderburg states that Mr. Logan acted as solicitor for both himself and the plaintiffs, that he repeatedly informed him that he could not set a date for the giving up of possession of his house in Sarnia, as such date depended on his obtaining possession of the house in Petrolia. He says that he agreed to complete the transaction with the plaintiffs as of the 1st April 1946, reserving possession and paying rental for the occupation of the premises from 1st April 1946, and that he agreed to vacate as soon as he obtained possession of the house in Petrolia. He goes on to state that he purchased the house in Petrolia, and that some time during the month of April the tenant told him that he could not move in, and that owing to the regulations of the War-time Prices and Trade Board he could not obtain possession.

After he had the advantage of perusing Mr. Logan's affidavit, he made a further affidavit, in which he says he discussed with Mr. Logan in his office the terms of the offer of purchase, and that he told him it would be all right to make the adjustments as of 1st April, but not to put him down to a definite date to vacate, that any reasonable arrangements with the Suttons for the period after 1st April would be all right with him. It is significant, I think, that nowhere in his affidavit does Mr. Vanderburg set up any definite arrangements to rent the property. He was quite content, apparently, to take the plaintiff's money, being the cash purchase-price of the house, and rely on their offer to him, which was in fact honoured by the plaintiffs, to allow him to stay there until the 1st April, and it was not until later during April, after he should have vacated, that he claimed that he had some further right to possession.

The deed is in the usual form pursuant to The Short Forms of Conveyances Act, R.S.O. 1937, c. 158, and contains the usual covenant that the grantees shall have quiet possession of the said lands, free of all encumbrances, and also the usual general release of all the grantor's claims upon the said lands. I think it is impossible to read the covenant as to quiet possession, as set forth in the Act, and likewise the form of general release, without coming to the conclusion that the plaintiffs are the possessors of a legal right to the quiet possession and occupation of the lands purchased by them from the defendant.

Under these circumstances, I am asked by the plaintiffs, by way of interlocutory application, for a mandatory injunction giving them, prior to the trial of the action, the substance of the relief asked for in the writ of summons. This is an extraordinary remedy, but in the view I take it is one which the plaintiffs have the right to ask of the Court. I am referred to the case of *Collison v. Warren*, [1901] 1 Ch. 812. In that case the proprietor of a hotel executed a deed of arrangement for the benefit of his creditors, by which he assigned to a trustee all his property in the said business, except the leasehold house in which the business was carried on. Collison was to be retained as manager in the service of the trustee, but owing to certain intemperate habits he was summarily dismissed. He refused to accept this dismissal and commenced proceedings against the trustee, and issued a writ, claiming that he was entitled to be engaged as

manager and that he and his family were entitled to reside and board in the hotel. The defendant was the trustee, and he applied, by way of notice of motion for an interim injunction, for an order restraining the plaintiff from remaining in or upon the hotel. Commenting on this, Mr. Justice Buckley said:

“It is a novelty to me that an order can be obtained to restrain a person from remaining in a house, which is, of course, equivalent to a mandatory order upon him to go out. But I have been referred to *Spurgin v. White*, 2 Giff. 473, where the Vice-Chancellor granted an injunction to restrain the defendant till further order from ‘disturbing, hindering, or molesting the plaintiffs, or their agents, in the possession or enjoyment of the said house, books, stock-in-trade, pictures, furniture and effects, or in carrying on the business and objects of the said society at the said house’—that is, from interfering with the occupation of the house; and the order contained words giving the defendant the right to use two rooms for two months with a right of access to other rooms for the purpose of removing his stock and property. As I read that, an injunction was granted to restrain the defendant from interfering with the possession of persons who said that he was there wrongfully. That appears to me to be a precedent for an order which I am prepared to make, which will have the effect of restraining the plaintiff from remaining in possession of the premises.”

This decision was appealed, and the judgment of the Court of Appeal was delivered by Rigby L.J., who said:

“It is plain that he [the plaintiff] is not claiming to be there either as owner of the hotel, or as trustee for the person who has a charge upon it. That being so, I think there is no foundation for the plaintiff’s claim to retain possession of the rooms. He has been summarily dismissed from his position of manager by the trustee, with the approval of the committee of inspection. We have not now to consider the precise grounds alleged for the plaintiff’s dismissal, but he has been summarily dismissed. The trustee has paid him a sum of money as covering all possible damages to which he may be entitled. We have not now to consider whether that is the right amount or not. Upon the plaintiff’s dismissal his right during his engagement as manager to occupy rooms in the hotel was, in my opinion, terminated, and although the operation of the injunction has been suspended

first by the learned judge for a fortnight, and afterwards by the order of this Court over to-day, I cannot see that this affects the question whether the order ought or ought not to have been made. Under the terms of the creditors' deed the trustee is entitled to manage the business as he thinks fit, not as the plaintiff thinks fit. In my opinion Buckley J. was quite right in granting the injunction, and the appeal ought to be dismissed."

The question has also been considered by the Court of Appeal of Saskatchewan in the case of *Pratt v. Scheveck*, 21 Sask. L.R. 154, [1926] 3 W.W.R. 657, [1926] 4 D.L.R. 1169. In that case an application very similar to the present one, for an interim injunction, was granted, and appeal was taken from the decision of the single judge to the Court of Appeal. This case, as summarized in the headnote, holds that an applicant for an injunction to restrain the violation of a common law right is entitled thereto as of course when once he has established his right, and there are no special circumstances. The principal reasons were delivered by Mr. Justice Lamont; at p. 157, the learned judge said:

"The injunction under review in this appeal is an interlocutory mandatory one. Ordinarily, an interlocutory or interim injunction is granted to preserve matters *in statu quo* until the case can be tried. It may however be granted to prevent repetition or continuance of a wrongful act. But to entitle a plaintiff to a mandatory injunction on an interlocutory application, he must make out a strong *prima-facie* case to the right which he asserts and for active interference on the part of the Court. If, however, the plaintiff's right is reasonably clear, and the Court thinks that relief ought to be granted at once, and particularly if there exists an urgent and paramount necessity for the order to prevent the commission of serious damage to the plaintiff, an injunction will issue before trial (17 Halsbury, 222; 32 Corpus Juris, 25). Here the plaintiff's right is clear, as it is not contended for the defendant that he had acquired any right to possession except such right as the agreement gave him, and as I construe the agreement, this right no longer exists. His continued occupation of the house was in my opinion a matter of serious damage to the plaintiff, who required the house for his servants or agents during harvesting and threshing operations."

And further the learned judge discussed the matter in view of certain other authorities as follows:

"There is however another ground upon which the order appealed from can not only be supported but upon which the plaintiff would appear to be entitled to it. In *Imperial Gas, Light & Coke Co. v. Broadbent*, 7 H.L. Cas. 612 (11 E.R. 239, at p. 244) Lord Kingsdown said: 'The rule I take to be clearly this: if a Plaintiff applied for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation.'

"In *Cowper v. Laidler*, [1903] 2 Ch. 337, Buckley J. at pp. 340 and 341, said: 'The plaintiff's easement of light is a right at common law. The remedy in equity by way of injunction is a remedy in aid of that legal right. The plaintiff is entitled to an injunction, not in the discretion of the Court, but as of course, unless there is something special in the case such as laches, or that the interference with the right is only trivial or occasional.'

"In the case at bar, the plaintiff's right to the possession of the premises of which he was the registered owner is a legal right (Pollock and Wright on Possession in the Common Law, 1888, p. 19). An injunction to restrain any interference with that right would not be refused unless he had parted with his right, or had so dealt with the property that a Court of equity would consider it unfair or unconscionable that the defendant should be dispossessed before the trial of the action. As the whole right of the defendant to continue in possession was based upon the agreement, and, as I have pointed out, the agreement gave the defendant no more than an implied right to occupy the premises while he was cultivating the land, there is nothing inequitable in asking him to give up possession; in fact it would, in my opinion, be inequitable as between the parties unless he were compelled to do so."

It is stated to me by counsel for the defendant that a mandatory injunction of the kind asked here may be granted, but that the right to obtain it must be very clear indeed. I quite

agree with this general statement. However, it seems to me that this is one of those cases where there is a clear need for the remedy asked for. By the deed given by the defendant, the plaintiffs are clearly entitled to the possession of the purchased premises. His only right to possession when he once sold the property rested on his right under the offer of purchase, which only contemplated possession up to the 1st April. The defendant has not, in my opinion, successfully established any further arrangement with the plaintiffs which would entitle him to remain longer in possession of the property he sold to them. He, of course, does not deny the sale, or that he took the purchaser's money and pocketed it, and, as I have stated, he does not establish, nor does he seriously try to set up, any new right by way of lease which might enable him to retain further possession.

It seems to me that while an order of this sort should only be made very cautiously, any other remedy would be quite inadequate. I am advised that the issues in this action will, in the ordinary course of events, not come on for trial until next December, and it is very questionable whether damages can ever be a proper compensation to the plaintiffs if they are deprived of the property which they paid for until that time. Under these circumstances, the order should go.

As to the form of the order, however, it should not, I think, be in the indirect form suggested in the notice of motion. This was discussed in *Jackson v. Normanby Brick Company*, [1899] 1 Ch. 438. In that case an application was made which required the performance of certain acts, such as the pulling down and removal of buildings. The action was to restrain the defendants from building on the land contrary to the provisions of the lease. Lindley M.R., in giving judgment, said:

"The plaintiff is entitled to an order in the terms of the notice of motion. The registrar has called our attention to the form in which orders of this kind have hitherto been made, namely, restraining the defendant from allowing the buildings to remain on the land; but in future it will be better for the Court to say in plain terms what it means, and in direct words to order the buildings to be pulled down and removed. The order will therefore go."

An order should therefore issue directing the defendant to deliver up possession of the house and premises in question to

the plaintiffs. Owing to present housing conditions, the order will not issue immediately, but after the 15th June. Costs will be costs in the cause.

Order accordingly.

Solicitors for the plaintiffs, applicants: Logan & Logan, Sarnia.

Solicitors for the defendant: Mackenzie & Atkey, Petrolia.

[McRUER C.J.H.C.]

Rex v. Adams.

Criminal Law—Place of Trial—Motion for Change of Venue—Grounds for Allowing—Necessity for Showing that Full and Impartial Trial Not Obtainable—The Criminal Code, R.S.C. 1927, c. 36, s. 884.

Section 884 of The Criminal Code is apparently a codification of the common law, and an applicant under that section for an order changing the place of trial must show that a full and impartial trial cannot be had in the particular county in which the venue has been properly laid. If the inconvenience to the accused may be so great that without a change in the place of trial there may be a denial of justice, it can be said that a "full" trial cannot be had. To show that there cannot be an "impartial" trial, the applicant must produce evidence (not merely statements of opinion by his counsel or other persons) demonstrating that there is reasonable ground for apprehending that the jurors of the county, properly instructed, will not render a true verdict according to the evidence given under oath. In this connection the accused's right of challenge is to be kept in mind.

Review of authorities.

A MOTION for a change of venue.

3rd May 1946. The motion was heard by McRUER C.J.H.C. in chambers at Toronto.

Joseph Sedgwick, K.C., for the accused, applicant.

J. R. Cartwright, K.C., for the Crown, *contra*.

8th June 1946. McRUER C.J.H.C.:—This is an application made by the accused under the provisions of s. 884 of The Criminal Code, R.S.C. 1927, c. 36, to change the place of trial from the county of Carleton to the county of York. At the date of the application the accused was on bail following a preliminary hearing at which he was committed for trial on a charge of conspiracy and a charge laid under The Official Secrets Act, 1939 (Dom.), c. 49.

Since the hearing of this motion an indictment has been preferred before a grand jury of the county of Carleton and a true bill found, in which the accused is charged with three counts involving conspiracy to commit an indictable offence and breaches of The Official Secrets Act. The material filed in support of the application shows that the charges arise out of a matter that was the subject of an investigation by a Royal Commission set up under The Inquiries Act, R.S.C. 1927, c. 99. It is alleged that the findings of the Royal Commission received wide publicity in the county of Carleton, and counsel for the accused particularly stresses the following paragraph in the published report of the Commission:

“Adams’ conduct and associations with Soviet agents, his personal sympathies dating back at least to 1935 which made him easily receptive to the suggestions of Messrs. Zabotin and Rogov, his endeavours to obtain information of a secret nature, which turned out in many instances to be fruitful, as evidenced by the testimony of Miss Willsher, and the documents from the Embassy, leave little doubt in our minds that he has conspired to commit offences in violation of the Official Secrets Act, and that he has also committed the substantive offences of obtaining for the benefit of a foreign power, secret information, and of inciting others to commit such offence.”

Counsel also relies on the fact that there was like publicity given to the proceedings at the preliminary hearing, at which, it was said, evidence was admitted that was objected to on the ground that it was hearsay. There is no doubt that the proceedings that led up to this case, as well as other associated cases, created much public interest not only in the city of Ottawa but throughout Canada.

An order may be made changing the place of trial “Wherever it appears to the satisfaction of the court or judge . . . that it is expedient to the ends of justice that the trial of any person charged with an indictable offence should be held in some district, county or place other than that in which the offence is supposed to have been committed”: s. 884, The Criminal Code. The provisions of this section appear only to codify the common law.

As early as 1762 it was said:

“There was no rule better established than ‘that all causes shall be tried in the county, and by the neighbourhood of the place, where the fact is committed.’ And therefore that rule ought never to be infringed, *unless* it plainly appears that a fair and impartial trial can not be had in that county”: *Rex v. Harris et al.* 3 Burr. 1330 at 1334, 97 E.R. 858.

The language used by judges in interpreting the principles of law to be applied on an application of this sort has not always been uniform, and in some cases has been fundamentally different. This much, however, is clear, that the discretion to be exercised must be exercised on evidence and not on mere opinions set out in affidavits of counsel or others as to the likelihood of prejudice to the accused.

In *Reg. v. Ponton* (1898), 18 P.R. 210, 2 C.C.C. 192, Robertson J., at pp. 218-220, quotes from a judgment of Sir Adam Wilson in *Reg. v. Carroll et al.* (unreported), in which he says:

"And the Court will refuse or grant the motion as it may see fit. But it will be granted when there is a reasonable probability that a fair and impartial trial cannot be had in the place where the cause would otherwise be tried . . . But to justify me in making the change asked for, I must be satisfied that it is expedient to the ends of justice that it should be so changed, and I cannot say that I am satisfied that it is clearly made out that there is a fair and reasonable probability of partiality or prejudice in the jurisdiction within which the indictment would otherwise be tried".

The authority relied on is Archbold's Pleading and Evidence in Criminal Cases, 18th ed., p. 100. The 31st edition (1943) of Archbold uses the following words, at pp. 92-3:

"The King's Bench Division of the High Court of Justice has jurisdiction to change the place of trial of any felony or misdemeanor, whenever it is necessary for the purpose of securing, so far as possible, a fair and impartial trial."

In *Rex v. DeBruge* (1927), 60 O.L.R. 277, 47 C.C.C. 311, Kelly J., at p. 278, puts the jurisdiction as follows:

"Though the power to make the change is purely discretionary, in my opinion it should be used with great caution. One principal ground for a change of the place of trial is the reasonable probability of partiality and prejudice in the locality from which the jury would be drawn if the change were not ordered." He cited *Rex v. O'Gorman et al.* (1907), 14 O.L.R. 102, 12 C.C.C. 230.

In *Rex v. O'Gorman et al.*, *supra*, Britton J. follows *Rex v. Harris*, *supra*, quoting from Mr. Justice Denison, at p. 1334, as follows:

"The place of trial ought not to be altered from that which is settled and established by the common law, *unless* there shall appear a clear and plain reason for it'; *viz.*, that there cannot be there a fair and impartial trial."

I have come to the conclusion that the most satisfactory statement of the law is contained in Short and Mellor's Crown

Practice, 2nd ed. 1908, at p. 106. The author deduces from the cases that the courts will permit a change of venue only in cases where they are satisfied that a *full and impartial* trial cannot be had in the particular county in which the venue has been properly laid. The words "full and impartial trial", in my view, comprehend the considerations involved in an application of this character. There may be cases where the inconvenience to a party may be so great that without a change in the place of trial there may be a denial of justice. In such cases a "full" trial cannot be had. That is not this case. The remaining question to be considered is whether the evidence before me is such that it satisfies me that an impartial trial of the accused will not be held in the county of Carleton.

The only evidence that counsel relies on is the widespread publicity given to the findings of the Royal Commission in the month of March 1946, and the reports of the preliminary hearing in April 1946. Having regard to the shortness of the memory of the average individual for details of this sort that he reads in the daily papers, I doubt very much whether jurymen ultimately summonsed to try this case will, at the time when the case comes on for trial, remember much, if anything, that they have read in the press as applicable to this individual accused. Be this as it may, the evidence falls far short of convincing me that there is any reasonable ground to apprehend that the jurors of the county of Carleton, properly instructed, will not render a true verdict according to the evidence given under oath. It is also to be remembered that the accused will on his trial have twelve peremptory challenges and any number of challenges for cause.

I think the language of Denman C.J. in *Rex v. Holden et al.* (1833), 5 B. & Ad. 347 at 355, 110 E.R. 819, may be aptly applied to this case:

"... but there is nothing to shew that the great body of freeholders and others, out of whom the jury would be formed, are likely to be prejudiced, except by those feelings which arise from the nature of the offence, and which are common to all counties."

The application to change the place of trial will therefore be dismissed.

The applicant made an alternative application to postpone the trial until the autumn sittings of this Court. It would appear from developments that have taken place since the argument of this motion that it is highly unlikely that the accused will be called upon to stand trial at the present sittings of this Court. In respect of this application, I make no order.

Order accordingly.

Solicitor for the accused, applicant: Joseph Sedgwick, Toronto.

[McRUER C.J.H.C.]

Rex v. Mazerall.

Evidence—Admissibility of Evidence Given by Accused on Oath before Royal Commission—Inapplicability of Rules respecting Confessions to Police or Persons in Authority—Criminating Answers—Effect of Accused's Failure to Object—The Canada Evidence Act, R.S.C. 1927, c. 59, s. 5.

The effect of s. 5 of The Canada Evidence Act in its present form is that a witness, being examined before a tribunal authorized to take evidence under oath, is bound to answer questions even though his answers may tend to criminate him, and if he does not object to answer the questions when they are put to him, the provisions of subs. 2 do not apply, and the answers are receivable against him in any criminal trial or other proceeding thereafter. *Rex v. Clark* (1901), 3 O.L.R. 176, followed.

The fact that the witness is compelled by statute to answer the questions does not render his answers inadmissible against him in subsequent proceedings. *Walker v. The King*, [1939] S.C.R. 214; *Reg. v. Coote* (1873), L.R. 4 P.C. 599; *Reg. v. Scott* (1856), 1 Dears. & B. 47, and other authorities, applied. There is no onus on the Crown to prove that the answers were "voluntary", in the sense that they were not induced by any promise or threat, and the special rules applicable to the admissibility of statements made to police officers or other persons in authority have no bearing in connection with such answers.

TRIAL of an issue, during the trial of an indictment for conspiracy, as to the admissibility of evidence given by the accused before a Royal Commission appointed by Order in Council under The Inquiries Act, R.S.C. 1927, c. 99.

16th and 17th May 1946. The issue was tried by McRUER C.J.H.C., in the absence of the jury, at Ottawa.

J. R. Cartwright, K.C., Lee A. Kelley, K.C., and B. W. Howard, K.C., for the Crown.

Roydon A. Hughes, K.C., L. Lafleur, K.C., and R. K. Laishley, for the accused.

18th May 1946. McRUER C.J.H.C. (orally):—I have had the benefit of having the matters involved in this issue fully developed in the able arguments presented to me by counsel on behalf of the Crown and of the defence. The only duty I have to perform is to decide whether the evidence tendered is legally admissible. If it is, I am bound to admit it; if it is not, I am bound to reject it. I have to find the facts and interpret the law as I see it, and there my duty ends.

The evidence that is tendered by the Crown is evidence given by the accused under oath before a Royal Commission consisting of the Honourable Mr. Justice Taschereau and the

Honourable Mr. Justice Kellock, set up by Order in Council under the provisions of The Inquiries Act, R.S.C. 1927, c. 99. There is no doubt in my mind that the accused was properly sworn as a witness before the Commission; on the evidence I do not see that any other conclusion can be arrived at. Nor do I doubt that the Royal Commission was properly constituted under the provisions of The Inquiries Act with all the authority conferred on it under that Act to require such witnesses to give evidence under oath as the commissioners might deem requisite to the full investigation of the matters concerning which they were appointed to examine.

It is not suggested that the accused refused to give evidence before the Commission on the ground that it might tend to criminate him, or in fact on any other ground. Those being the circumstances under which the evidence tendered was given, what is the law governing its admissibility at this trial? Mr. Hughes in his very forceful and exhaustive argument puts the case for its rejection on three grounds:

(1) The onus is on the Crown to show that the proceedings before the Royal Commission were legal in every respect, and that the Order in Council appointing the Commission was strictly complied with.

(2) If there was something that affected the voluntary nature of the statements previously made to police officers, the onus is on the Crown to show that that impediment had been removed before the accused testified before the Commission.

(3) The Commission had by its conduct lost jurisdiction to examine the accused under oath.

This, I think, fairly summarizes my conception of the grounds on which Mr. Hughes' argument is founded.

As to the first point, that the onus is on the Crown to show that the proceedings before the Royal Commission were legal in every respect and that the Order in Council appointing the Commission was strictly complied with, I think both on the law and on the facts I am bound to hold that the Crown has discharged the onus.

Mr. Hughes' second point involves consideration of the matter on a broader basis. Argument was presented, and the case on the *voir dire* was developed, on the basis that the principles

of law applicable to statements made by accused persons to police officers or other persons in authority are applicable to the circumstances of this case. After careful perusal of all the authorities I have been able to obtain, I have come to the conclusion that those principles are clearly inapplicable to the matter that I have before me for decision. In those cases where an accused person has made a statement to a police officer or other person in authority, there is an onus on the Crown to show that the statement is voluntary, in the sense that it has not been obtained by threats or inducements held out, as the law presumes that under threat or inducement an accused person may tell that which is not true, either to escape the threatened punishment or to reap the benefits held out in the inducement. It is, however, quite different where evidence is given under oath; in such case the presumption is that the accused did not commit the crime of perjury and that his statements are true. In this case there is what I consider clear authority that I should follow, in fact authority which I am bound to follow, covering this branch of the argument.

The point under discussion is not a new one; it is one that has been discussed in our courts and in England in many cases. The common law of England in respect to the matter is expressed in the maxim *nemo tenetur seipsum accusare*—"No one is bound to accuse himself". That, however, may be altered by statute, and it has been altered in Canada by The Canada Evidence Act, R.S.C. 1927, c. 59. There are also many other statutes which make provision for the examination of those who may be suspected of crime, for example the Fire Marshal's Acts, the various provincial Acts respecting coroners' inquests, and particularly The Bankruptcy Act, R.S.C. 1927, c. 11, which not only provides that the debtor may be examined, but expressly provides that the evidence given on the examination may be used in evidence against him on charges laid under the Act.

For the purpose of this case it is, therefore, necessary only to consider the effect of the provisions of s. 5 of The Canada Evidence Act, which reads as follows:

"No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

"2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

As I interpret the authorities, the section applies to any witness lawfully giving evidence under oath before any properly constituted legal tribunal which has the power to take evidence under oath. This section has been discussed, both in its present form and in its form prior to its amendment by 1898, c. 53, s. 1, in many cases before the courts. In its original form, as 1893 (Dom.), c. 31, s. 5, it read as follows:

"No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him . . . Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence."

The earlier cases dealing with the section in its previous form clarify the purposes of the amendment and the construction to be put on the section as it now is. In *Reg. v. Hender-shott and Welter* (1895), 26 O.R. 278, the question that arose for decision was whether the protection provided in the section extended to a witness notwithstanding the fact that he failed to object to answering the question put to him. In that case, dealing with evidence given at a coroner's inquest, it was held that without objection by the witness the protection of the statute extended to him, and that the evidence given on the previous inquiry was not admissible at his trial.

In *Reg. v. Williams* (1897), 28 O.R. 583, the same question came before a Divisional Court two years later, and it was held that unless the accused objected to giving evidence on

the ground that it would tend to criminate him the evidence was admissible at a subsequent criminal trial.

The matter again came before a Divisional Court in *Reg. v. Hammond* (1898), 29 O.R. 211, 1 C.C.C. 373, in which the Court did not follow *Reg. v. Williams, supra*, and held that the accused was entitled to the benefit of the protection given by the statute, even though no objection was taken at the earlier proceedings. Then followed the amendment to the statute so that it should read as it now does.

Mr. Justice Osler, in *Rex v. Clark* (1901), 3 O.L.R. 176 at 181, 5 C.C.C. 235, reviews the previous authorities and deals with the statute as amended:

"A point was made, that the latter evidence had been improperly admitted [—that was evidence given at previous proceedings—], but, notwithstanding Mr. Teetzel's ingenious suggestion, I am of opinion that the 5th section of the Canada Evidence Act, 1893, 56 Vict. ch. 31 (D) as amended by 61 Vict. ch. 53 (D), removes, as I read it, the ground for the differences of opinion, which prevailed as to the proper construction of the section as it originally stood: See *Regina v. Hendershott and Welter*, [*supra*]; *Regina v. Williams*, [*supra*]; *The Queen v. Hammond*, [*supra*].

"If when called upon to testify, that witness does not object to do so on the ground that his answers may tend to criminate him, his answers are receivable against him (except in the case the section provides for) in any criminal trial or other criminal proceeding against him thereafter."

The law of Ontario therefore is that a witness being examined before a tribunal authorized by law to take evidence under oath is bound to answer questions even though they may tend to criminate him, and if he has not objected to answer such questions at the time they are put to him the provisions of subs. 2 of s. 5 of the Canada Evidence Act do not inure to his benefit.

I shall now deal with the question whether the answers so given under oath before a lawfully constituted tribunal with power to take evidence ought to be considered in the light of the body of law dealing with statements made not under oath to persons in authority, and whether there was any onus on the Crown to show that if there had been any threat or induce-

ment held out to the witness by anyone in authority that had been removed before the accused gave evidence.

The first proposition involved in this question has been dealt with in several cases, to some of which I shall make reference.

Reg. v. Scott, Dears. & B. 47, 169 E.R. 909, which has been consistently followed, was decided as long ago as 1856. At p. 59 Lord Campbell states as follows:

"Finally, the defendant's counsel relies upon the great maxim of English law '*nemo tenetur se ipsum accusare*'. So undoubtedly says the common law of England. But Parliament may take away this privilege, and enact that a party may be bound to accuse himself; that is, that he must answer questions by answering which he may be criminated. This Act of Parliament, 12 & 13 Vict. c. 106, creates felonies and misdemeanors, and compels the bankrupt to answer questions which may shew that he has been guilty of some of those felonies or misdemeanors. The maxim of the common law therefore has been overruled by the Legislature, and the defendant has been actually compelled to give and has given answers, shewing that he is guilty of the misdemeanor with which he is charged. The accusation of himself was an accomplished fact, and at the trial he was not called upon to accuse himself. The maxim relied upon applies to the time when the question is put, not to the use which the prosecutor seeks to make of the answer when the answer has been given. If the party has been unlawfully compelled to answer the question, he shall be protected against any prejudice from the answer thus illegally extorted; but a similar protection cannot be demanded where the question was lawful and the party examined was bound by law to answer it. At the trial the defendant's written examination, signed by himself, was in Court, and the reading of it as evidence against him could be no violation of the maxim relied upon."

In *Reg. v. Erdheim*, [1896] 2 Q.B. 260, Lord Russell of Killowen, Lord Chief Justice of England, referring to *Reg. v. Scott*, says, at p. 268:

"Lastly, as to the arguments based upon the principle '*Nemo tenetur se ipsum accusare*', the Court held that the statute of 1849 had in the case in question taken away this privilege by

enacting that he must answer touching all matters relating to his trade or estate without any qualification. It is to be observed that in this case there was no express provision that the answers of the bankrupt should be admissible in evidence against him. In my judgment, the principles enunciated in this case (with the decision in which I entirely agree) practically determine the present case."

This same question was dealt with by the Judicial Committee of the Privy Council in *Reg. v. Coote* (1873), L.R. 4 P.C. 599, C.R. [6] A.C. 282. The matter under consideration by the Judicial Committee in that case was whether evidence given, without objection being taken, at a fire marshal's inquiry held under The Fire Marshal's Act of the Province of Quebec could be read in evidence against the accused on his trial on a charge of arson arising out of the fire that had been under investigation. I am convinced that the decision of the Judicial Committee is in point in this case, and I have no right to refuse to follow it. At p. 605, Sir Robert Collier says:

"Their Lordships are unable to concur in what appears to be the view of one of the Judges of the Court of Queen's Bench, that the law on the subject of the reception in evidence against a Prisoner of statements made by him upon Oath is so unsettled, that every Judge is at liberty in every case to act upon his own individual opinion."

And at p. 607, after referring to several cases, including *Reg. v. Scott*, *supra*, he says:

"From these cases, to which others might be added, it results, in their Lordships' opinion, that the depositions on Oath of a Witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consist of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle '*nemo tenetur seipsum accusare*', but does not apply to answers given without objection, *which are to be deemed voluntary*." (The italics are mine.)

The Judicial Committee also considered the question whether the accused might have been ignorant of the law enabling him to decline to answer criminating questions, and whether if he had been acquainted with it he might have withheld some

of the answers which he gave. The matter is disposed of at p. 607 in the following language:

“ . . . it is obvious, that to institute an inquiry in each case as to the extent of the Prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule, recognized as essential to the administration of the Criminal Law, '*Ignorantia juris non excusat.*' ”

There is one other case in the English Courts to which I wish to make reference. In *In re Atherton*, [1912] 2 K.B. 251, it was sought to examine, under the provisions of The Bankruptcy Act, an accused who was in custody awaiting extradition on a criminal charge. Objection was taken on the ground that the examination might have the effect of causing him to make statements that would criminate him in respect of the criminal charge pending, and in reference to which extradition proceedings were pending. Mr. Justice Phillimore points out that, while there is a practice in England not to examine a bankrupt after charges have been laid against him, that is only a rule of convenience, and that it is perfectly lawful to do so; and the legal effect, as I read his judgment, of the evidence given, is not affected by the charges that are pending against him.

Walker v. The King, [1939] S.C.R. 214, 71 C.C.C. 305, [1939] 2 D.L.R. 353, is the final authority on the subject in Canada. While the circumstances of this case are entirely different, it seems to me that the principles of law enunciated by the former Chief Justice of Canada, Sir Lyman Duff, at p. 217, clearly warrant the conclusions that I have deduced from the authorities already dealt with. There he says:

“In order to clear the ground, it seems to be necessary to observe at the outset that statements made under compulsion of statute by a person whom they tend to incriminate are not for that reason alone inadmissible in criminal proceedings. The term ‘voluntary,’ as employed in the summary description of the class of statements by accused persons which are admissible in criminal proceedings, is well understood by lawyers as importing an absence of fear of prejudice or hope of advantage held out by persons in authority and is inter-

preted and applied judicially according to lines traced by well-known decisions and by a well settled practice. But there is no rule of law that statements made by an accused under compulsion of statute are, because of such compulsion alone, inadmissible against him in criminal proceedings. Generally speaking, such statements are admissible unless they fall within the scope of some specific enactment or rule excluding them."

Reg. v. Scott, supra, and *Reg. v. Coote, supra*, are relied upon as authority for this statement.

I am not called upon to decide whether statements made by the accused to police officers before he was sworn as a witness were voluntary. No such statements are tendered in evidence by the Crown. I am referred to no authority, and I know of no authority, that justifies me in holding that, even if previous statements had been made which were of an involuntary character, the evidence given under oath by the accused on the subsequent hearing would be inadmissible unless the Crown proved that the accused's mind was free at the time of giving the evidence from those influences that tended to make the previous statements involuntary within the authorities governing statements made to police officers and others. When the accused was lawfully sworn to tell the truth under the sanctity of an oath, everything he said then took on a different character.

I now deal with Mr. Hughes' third ground of objection, *i.e.*, that the Commission, even if properly constituted, had by its conduct lost jurisdiction to examine the accused under oath.

I am not at all clear that this Court has, in these proceedings, any jurisdiction to review the conduct of the Commission or to decide that a Commission acting with apparent lawful jurisdiction has at any time by its conduct deprived itself of jurisdiction. I am, however, in a position to dispose of the arguments put forward without deciding this point.

It is argued that, as no summons was issued to the witness, this had some bearing on the legality of the evidence given under oath by him. I am of opinion that, the accused being before the Commission and having been sworn, the commissioners were then lawfully entitled to take his evidence, and in fact that the accused, being before the Commission,

could not have refused to be sworn and to give evidence, under the provisions of The Inquiries Act.

It is also argued that the Commission lost jurisdiction to take evidence under oath on the ground that the accused did not have the benefit of counsel when giving evidence. Section 12 of The Inquiries Act provides:

"The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of such investigation, to be represented by counsel."

There is no evidence before me, and it was not suggested in argument, that before or during the taking of his evidence the accused at any time applied to the Commission to be represented by counsel, or that the Commission denied him the right to be represented before it by counsel. In the lengthy examination on the *voir dire* no evidence was given of anything that took place before the Commission which affected the accused in giving truthful answers to the questions put to him.

Following *Rex v. Hammond* (1941), 28 Cr. App. R. 84, I permitted Crown Counsel to put the following question to the accused on the *voir dire*:

"Q. Mr. Mazerall, would this be a fair and correct statement, that throughout the giving of your evidence before the Royal Commissioners you endeavoured to the best of your ability to tell the truth throughout? A. Yes."

Even were I permitted to consider it in my present judicial capacity, I cannot find the slightest ground for finding that the commissioners at any stage of the inquiry dealt with in the evidence before me acted without jurisdiction.

A great deal of the evidence given on the *voir dire* goes more to the question of the weight of the evidence tendered than to its legal admissibility.

Therefore, there being no specific enactment or rule of law excluding the statements that are tendered in evidence, I have come to the conclusion that I am bound to permit them to be received, and I direct that they be so received. I do not, however, direct that the transcript as tendered be received in its entirety. I shall have to follow it carefully as it is read, and I ask the co-operation of all counsel that any questions and

answers which may be objectionable be not read until I have had an opportunity of considering them and dealing with their admissibility. I have particular reference to any quotation or reference to statements that may have been made at an earlier time to police officers, and to questions and answers that may deal with matters that are not relevant to the charge against the accused. Only such evidence may be put in in this way as may be led by the Crown as evidence in chief relevant to prove the charge before the Court.

Evidence admitted.

[COURT OF APPEAL.]

Re Plant.

Wills—Construction—Gift, apparently Absolute, Followed by Gift Over.

A testatrix directed that her bonds, money in bank, etc., were to be put in her mother's name, "but taken care of on condition described herein". She proceeded to direct that the bonds should not be sold unless all other "principal" was exhausted and more was required, and that her executor, if he could obtain more interest, might invest the money in the bank "according to his own good judgment". She further provided that her mother was to have "a drawing account up to \$30.00 per month", and that on the mother's death "all money & Bonds left" should go to R.

Held, upon a true construction of the will the mother took only a life interest in the assets, but with power, in addition to receiving the income from them, to encroach upon capital to the extent of \$30 per month. *Re Walker* (1924), 56 O.L.R. 517, distinguished: *Re Scott* (1925), 58 O.L.R. 138; *Re Johnson* (1912), 27 O.L.R. 472; *Re Cutter* (1916), 37 O.L.R. 42; *Re Richer* (1919), 46 O.L.R. 367, discussed; other authorities referred to.

AN APPEAL by Andrew E. Ross in his personal capacity from an order of Treleaven J. made in Weekly Court at Toronto. The facts are stated in the reasons for judgment.

7th June 1946. The appeal was heard by HENDERSON, ROACH and HOGG JJ.A.

A. S. Pattillo, for the appellant: Where a gift over is imposed upon a prior gift, it is not repugnant and void unless the prior gift is absolute in its terms. If there is no repugnancy, the gift over prevails, and the prior gift is limited to a life estate: *Constable v. Bull* (1849), 3 DeG. & Sm. 411, 64 E.R. 539; *Re Cutter* (1916), 37 O.L.R. 42, 31 D.L.R. 382; *Re Richer* (1919), 46 O.L.R. 367, 50 D.L.R. 614; *Stadler v. Canadian Bank of Commerce*, 64 O.L.R. 69, [1929] 3 D.L.R. 651. Here there is no direct gift to the mother; the words "but taken care of on condition described herein" indicate that there was to be a trust, and are inconsistent

with any intention to make an absolute gift to the mother. The words of the gift over are not repugnant to the words used in making the gift to the mother, and are consistent with the clearly expressed intention of the testatrix that the gift to the mother was to be for life only.

C. D. Stewart, for Andrew E. Ross, as executor of the estate, had no argument to advance.

John J. Robinette, K.C., for the respondent: The learned judge correctly held that upon a true construction of the will the respondent became absolute owner of the bonds and other assets. No words are used in the will indicating that the mother is to have only a life estate, and the rule in *Re Walker* (1924), 56 O.L.R. 517, is applicable. The attempted gift over to the appellant of what is left fails as being repugnant to the absolute gift to the mother. The testatrix gave to her mother all the rights incidental to ownership. All the assets were to be placed in the name of the mother, not of the executor, and she has power to sell them and to use up all the capital. It is legally impossible to give whatever remains upon her death to the appellant. In all the cases referred to by the respondent the language of the will clearly indicated that the gift was for life only, and there is no restriction in this will.

A. S. Pattillo, in reply.

Cur. adv. vult.

18th June 1946. The judgment of the Court was delivered by

HOGG J.A.:—This is an appeal from an order dated the 16th April 1946, made by Treleaven J. upon an application to him for the interpretation and construction of the last will and testament of Blanche F. Plant, deceased, by which order it was declared that Mary E. Plant, the mother of the testatrix, acquired the absolute ownership of all the bonds, money in the bank, and moneys secured by promissory notes mentioned in the aforesaid will. The will is dated 16th May 1940, the testatrix died on the 16th January 1943, and probate was granted to Andrew E. Ross, as executor, on the 2nd February 1943.

It is very apparent that the will in question was not drawn by one familiar with such matters, and from the language used it may, I think, be inferred that it was drawn by the testatrix herself, or by one equally unfamiliar with such a task.

Those parts of the will which are material read as follows:

“My Government Bonds & money in Bank & money out in

note etc. I wish put in my Mothers name but taken care of on condition described herein.

2

"Money to be left in Bonds & not sold. Unless such time should come that all other principal is used up & it should be necessary to get more principal. She may then sell same.

"Should my executor have safe & better means of secure more interest than leaving same in bank. He may use money in bank to invest according to his own good judgment.

"My Mother may have a drawing account up to \$30.00 per month, but if it is not necessary for her to use that much she may draw as little as she wishes

"At the death of my Mother. I wish all money & Bonds left to go to my friend Andrew E. Ross."

The learned trial judge in his reasons for judgment stated that he followed the principle laid down in *Re Walker* (1924), 56 O.L.R. 517, in the Court of Appeal. In the will which was the subject of interpretation in that case, the testator gave and devised unto his wife all his real and personal property, with certain exceptions, and, with respect to any portion of the estate which remained in the hands of the wife at the time of her decease, undisposed of, such remainder was divided among certain other persons. It was held that the widow took an absolute estate in the property. Middleton J.A. referred to *Re Walker*, *supra*, in the later case of *Re Scott* (1925), 58 O.L.R. 138, [1926] 1 D.L.R. 151, in the Court of Appeal, and said that there were two classes of cases in which a testator, after apparently conferring a benefit, purports to deal with the property upon the death of the person upon whom the first benefit is conferred—first, those in which the later provision shows that the first taker was not intended to take absolutely, but was intended to have a life estate only; and second, those in which the first taker was intended to take absolutely, and, therefore, the attempted gift over of all that might remain on the death of the first taker was repugnant and void. He further said:

"It was also pointed out that there is a third class of cases constituting an exception to the first class: cases in which the first taker had only a life-estate, but there was in addition the right to the first taker to encroach upon the corpus of the estate."

In my opinion the language of the will now before the Court is such that it cannot be said to fall within the principle laid down in *Re Walker, supra*. I do not think it can be held, in view of the language and terms of this will, that Mary Plant, the mother of the testatrix, was intended to take absolutely. There are no direct and certain words of absolute gift and the will falls not within the second, but within that third class of cases mentioned by Middleton J.A. in *Re Scott, supra*.

The bonds and money and the note are to be put in the mother's name, but "taken care of on condition described herein". There is the direction that the bonds are not to be sold until such step should be found necessary for the reasons mentioned. The executor is given the power to invest the moneys in the bank according to his own judgment. Furthermore, the mother of the testatrix is to have a drawing account up to \$30 per month, and at her death the remaining money and bonds are to go to the executor. The plain intention of the testatrix, to be gathered from the language of the will, is that the beneficiary is not to have an absolute interest in the property left to her. The principle which, it seems to me, is to be followed is that stated by Chancellor Boyd in *Re Johnson* (1912), 27 O.L.R. 472, 8 D.L.R. 746. There, the testator's estate was left to his wife for life and upon the wife's death, legacies were given to various sons to be paid "if there is sufficient funds to pay the same." It was held that the wife took a life interest in all of the property and that she might encroach on the capital for purposes of maintenance. The estate consisted of real and personal property. At p. 478, Boyd C. said, referring with approval to a Nova Scotia case of *Re McDonald Estate* (1903), 35 N.S.R. 500:

"It was decided by Townshend J., and affirmed by Justices Ritchie, Graham, and Meagher, that the wife was entitled to more than the income, and had a right to use a part, if not the whole, of the principal. And the question submitted was approved of, viz., that, if the income was insufficient for the maintenance and support of the widow, the executors would be justified in allowing her as much out of the principal of the personal property as might be necessary therefor."

The next case upon the point in question is that of *Re Cutter* (1916), 37 O.L.R. 42, 31 D.L.R. 382, in which the judgment again is that of Chancellor Boyd. There, the testator left all the residue of his estate to his sister, and on her decease the unused

or unexpended balance was to revert to the Odd Fellows Home and in the event of her marriage all the residue bequeathed to her should go to the said Home. It was held that the testator's sister took a life estate and that if necessary the capital of the estate might be encroached upon for the purpose of her proper maintenance.

There then followed the case of *Re Richer* (1919), 46 O.L.R. 367, 50 D.L.R. 614, in the Court of Appeal, in which the testator gave to his wife the free use of his estate for her lifetime, and the balance remaining unspent on her death was given to his four children. Riddell J., at p. 371, said:

"Many cases were cited to us as deciding that 'the free use' of an estate gives the beneficiary a fee simple in the estate; and it is quite beyond question that these words can bear this interpretation. But here there is in plain contemplation of the testator the chance, if not the expectation, of a 'balance' remaining of the estate at the time of his widow's death. This would be quite inconsistent with the hypothesis that she took everything."

See also *Re King*, [1940] O.W.N. 57.

The conclusion I have reached is that because of the intention of the testatrix, to be found in the language of the will, and following the above-mentioned authorities, Mary Plant has a life interest in the Government bonds, money in the bank, and money secured by notes, and, having such life interest, is entitled to all of the attributes which are part of, and attached to, a life interest, that is to say, she is entitled to the income therefrom. The language of the will, in my view, shows that the testatrix intended that her mother, in addition to having the income from the estate, might also, if she found the income not sufficient for her maintenance, and it was necessary to do so, encroach upon the capital up to an amount of \$30 each month, and use that amount if necessary.

The appeal should be allowed and judgment entered as above set out; costs of the appeal to the parties from the estate, those of the executor to be as between solicitor and client.

Appeal allowed.

Solicitors for the appellant: Blake, Anglin, Osler & Cassels, Toronto.

Solicitor for the respondent: J. J. Robinette, Toronto.

Solicitors for the executor: Stewart & Stewart, Toronto.

[URQUHART J.]

Bowers et al. v. J. Hollinger & Co. Limited et al.

Workmen's Compensation—Effect of Statute on Common Law Right of Action—Employee's Action against Negligent Third Party, itself an Employer—Whether Accident Arose "out of" and "in course of" Employment—Voluntary Payment of Compensation—The Workmen's Compensation Act, R.S.O. 1937, c. 204, s. 2; s. 8(6), as re-enacted by 1945, c. 28, s. 1—The Government Employees Compensation Act, R.S.C. 1927, c. 30, as amended by 1931, c. 9.

E. Co., which carried on war work for the Dominion Government at a plant some four miles outside Toronto, made an arrangement with H. Co. for the transportation to and from work of such employees as chose to avail themselves of it. The cost of this transportation was borne by E. Co., but the employees were not paid for their time while in transit, and no difference was made in wages according to whether or not they used it. The plaintiffs, all employees of E. Co., were injured while travelling home after work, as the result of a collision between H. Co.'s bus and a transport. It was admitted that the collision had been caused by the joint negligence of H. Co. and the driver of the transport, and it was proved that both H. Co. and the transport company were "employers" within the provisions of Part I of The Workmen's Compensation Act.

Held, s. 8(6) of The Workmen's Compensation Act, as re-enacted in 1945, did not operate to prevent the plaintiffs from recovering damages from H. Co. and the transport company. It was doubtful whether E. Co., in respect of its war work, came within Part I, and if it did not, there was no question of election under s. 8(6). *The King v. The City of Montreal*, [1945] S.C.R. 621, applied. Even, however, if E. Co. was an employer within Part I, s. 8(6) applied only if the conditions laid down in s. 2(1) were present, i.e., if the accident was one "arising out of and in the course of" the employment.

There is a distinction between the expressions "out of" and "in the course of". *Charles R. Davidson and Company v. M'Robb or Officer*, [1918] A.C. 304; *Upton v. Great Central Railway Company*, [1924] A.C. 302, considered. In the circumstances of this case, since the employees had a right, but were under no obligation, to use the means of transportation provided for them, it could not be said that the accident arose "in the course of" their employment. *Edwards v. Wingham Agricultural Implement Company, Limited*, [1913] 3 K.B. 596; *St. Helen's Colliery Company, Limited v. Hewitson*, [1924] A.C. 59; *Richards v. Morris*, [1915] 1 K.B. 221, considered.

Held, further, the fact that payments by way of partial compensation had been made by the Workmen's Compensation Board, on the instructions, and as the agent, of the Dominion Government, should not deprive the plaintiffs of their right of recovery against the wrongdoers, since the payments had been made voluntarily, for reasons of expediency, and the plaintiffs had all agreed to refund them. *Misner v. Toronto and York Radial R.W. Co.* (1908), 11 O.W.R. 1064; *Kovinsky v. Kovinsky* (1925-6), 29 O.W.N. 179; 30 O.W.N. 263; *Dawson v. Sawatzky*, [1946] 1 W.W.R. 33, considered.

Damages—Physical Injuries—Loss of Wages—Basis of Computation—Income Tax and Other Deductions at Source.

In assessing damages for loss of wages resulting from physical injuries, the basis of assessment is the plaintiff's gross wages, without taking into consideration deductions which might have been made by the employer on account of income tax or unemployment insurance. *Fine v. Toronto Transportation Commission*, [1945] O.W.N. 901; *Fairholme v. Thomas Firth and John Brown, Limited*, (1933), 49 T.L.R. 470; *Jordan v. Limmer & Trinidad Lake Asphalt Co. Ltd.*, [1946] 1 All E.R. 527, followed.

ACTIONS for damages for physical injuries.

27th May to 5th June 1946. The actions were tried by URQUHART J. without a jury at Toronto.

R. F. Wilson, K.C., and *K. G. Morden*, for the plaintiffs
Bowers et al.

M. L. Keyfetz, for the plaintiff Sinclair.

G. N. Shaver, K.C., and *G. M. Paulin*, for the defendant
Hollinger.

T. N. Phelan, K.C., for the defendant Toronto-Peterborough
Transport Company Limited.

18th June 1946. URQUHART J.:—Actions by a number of plaintiffs against two defendants, one of which is a bus company whose bus was, at the time of the collision with its co-defendant's transport, carrying the plaintiffs as passengers from a war plant in Scarborough on 26th January 1945.

The plaintiffs were all employees of General Engineering Co. (Canada) Limited, an Ontario corporation engaged at that time on a war project as agent for the Dominion Government. This corporation was also joined as a defendant, but the action as against it was discontinued at the time of trial.

The plaintiffs, at the time of the collision, were being transported by the Hollinger Company under an arrangement with the Engineering Company to transport any of its workmen who desired transportation from the plant to a certain point in the city, after his shift was over. This service cost the employee nothing, and was paid for by the Engineering Company on a per trip basis.

It was optional with the plaintiffs whether they would avail themselves of this facility offered by their employer. The plant of the Engineering Company was situated in Scarborough township, about four miles from the city of Toronto. Many of the employees, including the plaintiffs, took advantage of this form of transportation to and from work. Others, no doubt, used their own cars, either individually or in so-called "pools", or their bicycles or motorcycles, as the case might be. But enthusiasts could walk, if they wished.

General Engineering Co. (Canada) Limited are in the business of consulting engineers, but after the war just past was well under way, they commenced erecting plants for war work, and particularly this plant for the Dominion Government, built

on Government property. Later on, as agents first of the United Kingdom and later of the Dominion, they operated the plant, making fuses and other war materials. At the time of the collision in question they were working under a contract as agents for the Government of Canada.

Under this contract they had complete control over the hiring and discharging of employees, who were paid by cheque of the company, out of the company's bank account, which, however, was fed by funds of the Dominion Government advanced from time to time as required. The employees were recruited at a city employment office of the Engineering Company, and part of the inducement to hire was the offer of free transportation to and from a given point for those who wished to take advantage of it. This service was advertised by the company.

The plaintiffs, however, were paid a certain rate per hour, and the wage of each was determined according to the time she "clocked" in and out of the plant, and did not include the time spent on the bus on either journey. It made no difference to the employee's remuneration whether she took advantage of the bus service or not.

It was proved that both the defendants who continued in the case until the trial were employers under Part I of The Workmen's Compensation Act, R.S.O. 1937, c. 204. The Engineering Company in their ordinary work as consulting engineers also undoubtedly came under the same Part. They were assessed as such, but only in respect of employees in their downtown office in Toronto, and the numbers so assessed varied from time to time between seven and fifteen. The company was not assessed in regard to this particular project, which project employed several thousand workers.

The officer of the Workmen's Compensation Board who had charge of assessments considered that the company fell, not under the Ontario Act, but under The Government Employees Compensation Act, R.S.C. 1927, c. 30, as amended in 1931 by 21-22 Geo. V., c. 9.

The defendants before trial admitted that their joint negligence caused the collision in question in which the plaintiffs were injured. The case then resolved itself into a question of damages, and the consideration of several legal points arising out of the employment of the plaintiffs by the Engineering

Company, the status of that company, and the way "compensation" was handled.

The chief question to be considered is: Was the Engineering Company at the time of the accident under Part I of The Workmen's Compensation Act? If it was, then by virtue of s. 8(6) of that Act*, while these plaintiffs have not had their cause of action taken away (*i.e.*, in case some third party not under Part I of the Act was involved), no damages could be recovered in an action of this sort where all parties responsible for the accident and the employers of the workmen themselves are under Part I of the Act. This observation is, of course, predicated upon the conditions set out in s. 2 of the Ontario Act being present. I will deal with this aspect of the case later.

Section 8(6) in its present form was put in the Act by 9 Geo. VI, c. 28, s. 1. This amendment was assented to on 22nd March 1945, about two months after the accident. For some reason, although the amending Act of which this new subsection was a part did not come into force until the day on which it received the Royal Assent, the particular section of interest here was made retroactive, and deemed to have had effect on and from the 6th April 1944. The effect of this retroactive clause, if Mr. Phelan's argument is correct, is to deprive the plaintiffs of their rights which had accrued before its passing, and of their remedy altogether, so far as the defendants are concerned.

The reason for the retroactive provision in the amending Act is not clear, but it seems to be that an attempt was made by the Legislature, in the session of 1944, to pass legislation of like effect (8 Geo. VI, c. 69, s. 2) but it was thought that the section as drafted did not "fill the bill".

* The subsection referred to is as follows:

"(6) In any action brought by a workman of an employer in Schedule 1 or dependant of such workman in any case within the provisions of subsection 1 or maintained by the Board under subsection 3 and one or more of the persons found to be at fault or negligent is the employer of the workman in Schedule 1, or any other employer in Schedule 1, or any workman of any employer in Schedule 1, no damages, contribution or indemnity shall be recoverable for the portion of the loss or damages caused by the fault or negligence of such employer of the workman in Schedule 1, or of any other employer in Schedule 1, or of any workman of any employer in Schedule 1, and the portion of the loss or damages so caused by the fault or negligence of such employer of the workman in Schedule 1, or of any other employer in Schedule 1, or of the workman of any employer in Schedule 1, shall be determined although such employer or workman is not a party to the action."

Even if the Engineering Company comes under Part I of the Ontario Act, does s. 8(6) apply to prevent recovery in an accident of this sort?

By s. 2(1), to make it applicable the personal injury by accident must arise "out of and in the course of the employment".

Halsbury, in volume 34 (2nd ed. 1940) at p. 822, para. 1160, suggests that the injury must arise both out of and in the course of the employment. Halsbury's opinion is based upon the English Act, which is in practically the same terms as the Ontario Act, so far as s. 2(1) is concerned. The English Act contains no section corresponding to our subs. 2 of s. 2, which reads:

"Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment, and where the accident occurred in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment."

The Dominion Act as amended uses the same words as those used in s. 2(1) of the Ontario Act.

I have set out briefly the relevant facts accounting for the presence of the plaintiffs on the bus at the moment of the collision. The question is: Did the accident arise out of and/or in the course of their employment?

Mr. Phelan argued that the effect of the words used in s. 2(2) is that if either condition prevails, the other being presumed, it is unnecessary to prove both to make s. 8(6) of the Ontario Act applicable (*i.e.*, assuming for the moment that all three companies concerned are under the Ontario Act, Part I).

The English Workmen's Compensation Act, 1925, 15 & 16 Geo. V, c. 84, s. 1(1), also uses the words "arising out of and in the course of the employment", but as I have said, there appears to be no subsection corresponding to the Ontario subs. 2.

The term "arising out of the employment" means arising out of the work which a man is employed to do and what is incident to it. It is a very vague term and requires very little connection with the employment to make it applicable. Thus, in *Charles R. Davidson and Company v. M'Robb or Officer*, [1918] A.C. 304, Lord Finlay was of opinion that where a sailor was returning to his ship from temporary shore leave, and sustained an accident on a quay, the accident arose out of his employment. He

thought, however, that the accident did not happen in the course of his employment, and therefore that the English Act was not applicable.

Viscount Haldane, on the other hand, thought that the accident neither arose out of the employment, nor arose in the course thereof, although in *Upton v. Great Central Railway Company*, [1924] A.C. 302 at 306, 307-8, he said:

“Now the expression ‘arising out of’ no doubt imports some kind of causal relation with the employment; but it does not logically necessitate direct or physical causation . . .

“If, in the course of his employment, the workman meets with injury by an accident which has arisen directly out of circumstances encountered because to encounter them fell within the scope of the employment, compensation may be claimed.”

Lord Dunedin, in *Charles R. Davidson and Company v. M’Robb or Officer*, *supra*, said, at p. 321:

“It is obvious that the addition of the words ‘and in the course of’ are meant in some way either to qualify or further explain the words ‘out of.’ My own view is that they do the latter. It is in one sense difficult to imagine that there could be any injury held as arising out of the employment which would not also be in the course of the employment. But it may well be that the determination of the question whether at the moment of the injury the workman was in the course of his employment may go to solve the question of whether the injury arose out of the employment. Let me instance the case of the domestic servant who is run over in the street. Given but the two facts that the man is, e.g., a butler, and that he is run over in the street, you would not be able to decide whether the injury arose out of the employment or not. The facts are consistent with either supposition. But given the further fact that either (1.) he has been sent by the master on a message, or (2.) that he is enjoying an evening out, then you can determine whether he is in the course of his employment or not, and from that, if being run over is one of the inherent dangers of the street, you will be able to determine whether the injury arose out of the employment or not. Now, I have taken the illustration of a domestic servant purposely, because domestic servants are not, as colliers, and other workmen often are, engaged from day to day, but are engaged for a term, and the accident that happens is during the period of their engagement. In my view ‘in the course of employment’

is a different thing from 'during the period of employment.' It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work—e.g., in the workman's case the taking of meals during the hours of labour; in the servant's not only the taking of meals, but resting and sleeping, which follow from the fact that domestic servants generally live and sleep under the master's roof."

So, in that case, a distinction seems to be made between "arising out of" and "arising in the course of" employment. The Court below had held that what happened to the claimant happened in the course of his employment, but that it did not arise out of his employment.

Lord Finlay also said at p. 312:

"Whether the man was on his own business or his master's would be very material for determining whether an accident on the public streets arose out of the employment."

The expression "arising out of the employment" being vague, it is interpreted by and it interprets the other and more important expression.

It is my opinion that despite the wording of s. 2(2), *supra*, the section requires, as does the English Act, the existence of both elements before the Act can apply to prevent an action against a third party, even though that third party is also under Part I of the Act.

My opinion also is that there is a contrary intention manifest from the circumstances. For example, if the plaintiffs were going to their work in the bus at the time of the accident, it might be thought that the accident was something arising out of their employment, as Lord Finlay thought in the case of the sailor returning to his ship, but such could not be thought when the employee had left the plant and was simply going home to follow his own pursuits. The accident could not be said to arise out of his employment in the strictest sense, although in a narrow sense it could.

Now, to turn to what is meant by the expression "in the course of the employment". "In general, the employment begins as soon as the workman has reached the place where he is

employed, or the means of access thereto, and continues until he again reaches the same point at the end of his work": 34 Halsbury, p. 824, but a workman who has the right, by the terms of his employment, to the use of certain facilities, but is under no duty to avail himself of them, is not entitled to statutory protection for so doing.

In *Edwards v. Wingham Agricultural Implement Company, Limited*, [1913] 3 K.B. 596, the workman was supplied with a bicycle by his company. He used it to go to and from his daily work, but was under no obligation to do so. He also used it for making calls on the company's business during the day. On the day in question, his work having ended at 6 p.m., he was riding his bicycle on his way home and collided with a motor lorry. It was held that his employment had ended at 6 p.m., and that the accident did not arise in the course of the employment. Cozens-Hardy M.R. said, at p. 599: "... the protection given by the Act to a workman does not extend to his going to and from his work, unless there are some special circumstances."

Charles R. Davidson and Company v. M'Robb or Officer, *supra*, is a most useful case in determining when a person's employment begins (see p. 309).

In *St. Helen's Colliery Company Limited v. Hewitson*, [1924] A.C. 59, a colliery workman was injured on a train which had been provided by the railway under an agreement with the colliery to provide special trains for the colliery company's workmen travelling to and from another town. It was held that as the workman was under no obligation to use the train, the injury did not arise in the course of the employment. In that case the cost of travel, or part of it, was deducted from the workmen's wages but the workmen were not paid for the time consumed by travelling. Some workmen walked, some went by omnibus. The colliery in which the workman involved worked was six miles from his residence.

Lord Buckmaster said, at p. 67: "... it seems to me difficult to say that an accident occurring to him in the train must be in the course of his employment. The workman was under no control . . . nor bound in any way either to use the train, or, when he left, to obey directions; though he was where he was in consequence of his employment, I do not think it was in its course that the accident occurred."

Lord Atkinson said, at p. 70: "If each collier was bound by his contract to travel to his employer's colliery by this provided train, then cadit quaestio. The collier would be in the course of his employment when he was doing a thing he was bound by his contract of service to do. But the conferring upon a collier of a privilege which he is free to avail himself of or not, would, prima facie impose no duty whatever upon him to use it. It must, however, be borne in mind that if the physical features of the locality be such that the means of transit offered by the employer are the only means of transit available to transport the workman to his work, there may, in the workman's contract of service, be implied a term that there was an obligation on the employer to provide such means and a reciprocal obligation on the workman to avail himself of then." He referred, as an illustration, to *Richards v. Morris*, [1915] 1 K.B. 221, and suggested that a workman is acting in the course of his employment "when he is engaged 'in doing something he was employed to do'", or "doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service", and he goes on to say that "The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment".

The suggestion made above that the physical features of the locality might make a difference was only the opinion of one judge, and not that of the whole Court. It is, of course, entitled to the greatest respect. Mr. Phelan argued very strongly that, the plant concerned here being four miles out of the city and away from metropolitan transportation facilities, the suggestion of Lord Atkinson would govern. I am of opinion, however, that the physical disabilities would have to be more formidable than those of a mere flat piece of country supplied with good and well-paved thoroughfares. It would apply rather to an island or something of that sort, where the terrain itself provided a real obstacle. After all, the distance was only four miles, whereas in the colliery case above mentioned, the distance was six miles. A person *could* walk, or he could get a lift on occasion, because, with absenteeism fairly high as it was in this plant, space in car pools would not be fully occupied on all occasions.

In *Richards v. Morris*, *supra*, a decision of the English Court of Appeal, the employment was on an island, and it was part of the workman's contract that he should be allowed at reasonable

times to go to the mainland to visit his wife, and to be taken across for that purpose in his employer's boat. It was held that the accident arose "out of" as well as "in the course of" his employment.

In that case, however, not only was there the physical necessity, but also the crossing in the manner adopted was a term of the workman's contract, so that both conditions set forth in Lord Atkinson's reasons were satisfied.

I am of opinion, therefore, that the injury by accident to these plaintiffs did not arise in the course of their employment so as to make s. 8 of the Ontario Act applicable to them and to prohibit their recovering against the defendants. I am doubtful whether it could be said to have arisen out of the employment.

That being so, I do not need to do more than mention, but not examine, two other cogent grounds, advanced by Mr. Wilson, for saying that the company was not under the Ontario Act.

The first is that the Workmen's Compensation Board, after hearing arguments by both parties on the 9th April 1946, after this action had been commenced, it is true, made an order finding and declaring that the action was one the right to bring which is not taken away by Part I of The Workmen's Compensation Act.

Mr. Wilson's contention is that by so doing the Board has decided that the employees in question are not under the Ontario Act (without exactly saying so, however), and that being so, there is no legal basis for me to review that decision even if the order is wrong.

The defendant's answer to that is that the cause of action is not taken away, but that the right to recover damages is taken away.

The plaintiff's next argument is that these parties come under the Dominion Act by virtue of Order in Council P.C. 1913, dated 22nd April 1941 (filed as an exhibit), which they contend has the force of a statute and that the effect of it, and of an opinion of the then Deputy Minister of Justice, and a letter of the Department of Munitions and Supplies instructing the Ontario Workmen's Compensation Board to deal with the project in question under the federal Act, is to bring the project and its workmen under the Dominion Act above mentioned. In connection with that, there is also the circumstance above mentioned that the officials of the Ontario Board, independently of the above direc-

tions, considered that the project did not come under the Ontario Act, and did not assess the Engineering Company in respect of the operations of the project.

The Ontario Act, by s. 119, applies to many companies, and would ordinarily apply to the Engineering Company in its ordinary and general capacity, though not necessarily in its capacity in connection with the project in which the plaintiffs were employed. It also applies to employment by or under the Crown in the right of the Province, including any employment by a permanent Board or Commission employed by the Crown in the right of the Province.

Another argument of the plaintiffs is that this company came not under the Ontario Act, but under the Dominion Compensation Act, because of the work that it was doing at this project and its relationship to the Dominion Government.

No attempt is made by the Ontario Act to include employment by the Crown in the right of the Dominion or by companies in the employ of the Crown in the right of the Dominion. I am of opinion that such an attempt, even if made, would not be effective.

By The Interpretation Act, R.S.C. 1927, c. 1, s. 16, it is provided:

"No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby."

This section probably applies only to Dominion Acts. I am of opinion that there is no power in the Province by any of its enactments to bind the Crown in the right of the Dominion. I do not think that it is necessary for me to decide this point, but such is my opinion. The matter, I believe, is now being considered by the Court of Appeal in the case of *Attorney-General of Canada v. Tombs* recently argued before it.* Were this the only ground, I would defer the matter further, but, as I have said, there are other grounds available to the plaintiffs.

The situation here is that an Ontario company, carrying on its own organization, contracts to do certain things and perform certain services on the property of the Crown in the right of the Dominion, with Crown machinery and tools, for a certain fee and

* NOTE: Judgment has been delivered in the above appeal, but it was based upon another point, and this question was not dealt with: Ed.

with funds supplied by the Dominion Government. Mr. Wilson's argument on this point is that the work was carried on by the Crown through the agency of the Engineering Company, and that the resulting situation is the same as if the appropriate Minister had carried on the enterprise himself, and that the Ontario Act did not come into play and the parties fall under The Government Employees Compensation Act of Canada, *supra*.

In this argument I am of opinion that he is correct. The case of *The King v. The City of Montreal*, [1945] S.C.R. 621, [1945] 4 D.L.R. 225, [1945] C.T.C. 386, was referred to. The production contract with the Montreal Locomotive Company was, so far as can be seen from the report, a contract similar to the one between the Engineering Company here and the Crown. The Court decided that the company in question in that case was not an emanation of the Crown nor an instrumentality of the Government, so that the cases on that point do not appear to be applicable.

At p. 632, Rinfret C.J.C. said: "In such a case and under such agreements, we have not the occupation of the Company, but the occupation of the Crown; and the business carried on, in the circumstances, is not carried on by the Company, but carried on by the Crown itself on its own property."

The case was one of municipal taxation, but it is my opinion that the principles apply, and the situation as far as the Workmen's Compensation Acts are concerned must be the same as if the Crown, in the right of the Dominion, were conducting the business in question through the appropriate Minister, and the provisions of the Ontario Act therefore do not apply to prevent recovery against third parties who are at fault.

The plaintiffs come under the Dominion Act, in my opinion, and under this Act there is no question of election. The plaintiffs have their right of action against the offending third parties. They are therefore entitled to have their damages assessed on the usual basis, the principles of which were recently summarized by Barlow J. in *Fine v. Toronto Transportation Commission*, [1945] O.W.N. 901, [1946] 1 D.L.R. 221, 59 C.R.T.C. 93.

In all cases the parties have agreed on a figure for general damages suffered by each plaintiff, subject to the question of law. In assessing special damages, compensation for loss of employment is, by agreement, not to extend beyond the date of the closing of the plant on 31st July 1945 at the latest. I have

gone over and assessed the amount of special damages in the case of each individual plaintiff.

In regard to these special damages, the defendants have raised three points of law.

(1) That the Workmen's Compensation Board of Ontario, acting as agents for and on the instructions of Mr. Stevens, the officer in charge of The Government Employees Compensation Act of the Dominion, advanced to and/or on behalf of each of these plaintiffs a portion of their wages for the time or part of the time that they were off work as a result of their respective injuries, and also paid the major part of their hospitalization and doctors' bills, and that the plaintiffs not having lost these sums personally, to that extent such cannot be assessed against the defendants.

(2) That in assessing damages for loss of wages, income tax deductions and deductions for unemployment insurance must be taken into account. In other words, the basis of assessment on this point is not gross pay but the net or so-called "take-home pay".

(3) A minor point—that no allowance should be made for the services of a Dr. Jeffrey, who was a salaried employee of the Engineering Company, and that nursing services rendered by friends should not be assessed against the defendants.

Dealing with the first point—when the collision occurred, the war just concluded was approaching its climax and every effort of production was required on the part of the allied nations. The Dominion Government, which kept a watchful eye on this project, through Mr. Stevens, feared that labour difficulties would follow the accident, and when the company was asked by its injured employees what was going to be done on their behalf, Mr. Stevens authorized the payment of compensation, meantime, in the shape of some portion of the wages lost and some of the doctors' and hospital accounts, and such were paid by the Workmen's Compensation Board out of moneys belonging to the Dominion Government in their hands for that purpose up to a certain point.

I do not think that I need to go into the whole story. Mr. Wilson admits that these payments were voluntary, gratuitous, and probably illegal, which adequately expresses the situation. Mr. Stevens's evidence may be summed up as follows:

that the payments were made to help these people out, but in the expectation that the payments would be refunded; that the Government was not required to make the payments, but considered it good business to do so in order to prevent any disturbance or dislocation of the work carried on at the project, and in order to carry on the war effort at full blast as before.

In most, if not all, cases, some of these payments were made before there was secured from the plaintiffs, or any of them, contingent agreements to pay them back. A meeting of a considerable number of the plaintiffs was held at a later date, and all present were told that whatever they had received must be paid back out of the damages recovered, if such were recovered. All the plaintiffs present at the meeting, and others interviewed later, concurred in these arrangements. All have since signed retainers to their solicitors authorizing them respectively to deduct and pay over to the Dominion Government anything received by the plaintiffs in the interim.

These advances to and on behalf of the plaintiffs raise a very vexed question which continually comes up in accident cases. Very often we find it in this form, as I did in a recent case: An employee is injured by an automobile. His employer good-naturedly pays the injured man his wages as usual while he is laid up, without specifying that it is a loan or obtaining any definite binding obligation for repayment, or anything of that sort. Is the negligent one to escape his responsibilities by reason of such a circumstance?

In the discussion that follows I have ignored certain insurance cases cited on behalf of the plaintiff, believing the principles in those cases to be different. They are not applicable to the situation in question herein. The following cases, however, do throw light upon the subject.

In *Misner v. Toronto & York Radial R.W. Co.* (1908), 11 O.W.R. 1064, the Court of Appeal held that sums received by the plaintiff for benefit insurance from two benefit societies were not to be taken into account in the assessment of damages. As Osler J.A., quoting from Mayne on Damages, 6th ed. (1899), p. 538, remarked at p. 1069:

"The fact that he has guarded by anticipation against such an event neither diminishes the wrong itself nor the liability of the wrong-doer to pay for it."

In *Kovinsky v. Kovinsky* (1925), 29 O.W.N. 179, the mother of the injured man paid \$1,922 for hospital, surgery, etc. although the plaintiff was of age and unmarried. Grant J. (as he then was) held that the amounts could be recovered. It is true that an appeal in this case was allowed and a new trial ordered ((1926), 30 O.W.N. 264) but unfortunately the Court gave no reasons for its action. As Grant J. had asked the jury when their verdict was rendered whether they had included the above sum in their verdict and the jury indicated that they had, if that were the real error, the Court could easily have corrected it. This authority may not be of much weight, however, in view of the allowance of the appeal.

In *Dawson v. Sawatzky*, [1946] 1 W.W.R. 33, [1946] 1 D.L.R. 476, the Court of Appeal of Saskatchewan held that a voluntary payment made by a third party to a plaintiff, against the amount of damage to a chattel damaged by the negligence of the defendant, does not exonerate the defendant and cannot be pleaded in reduction of damages payable by him.

One of the cases relied upon as a basis of that judgment was the *Kovinsky* case, and in dealing with it Gordon J.A., delivering the judgment of the Court, said: "I think with every deference that the learned judge was correct in rejecting such a contention. As stated by him, such a course would be a gift to the wrongdoer and not to her son." The Court was probably not informed of the appeal in the *Kovinsky* case having been allowed. (Reference also to *Workmen's Compensation Board and Glover v. Rutherford*, 59 O.L.R. 364, [1926] 4 D.L.R. 635).

Whatever was done in the present case was done apart from the wrongdoers, and it is my opinion that they should not be allowed to escape their responsibility for the results of the accident because of the gratuitous payments made by the Government. So I must decide this point in favour of the plaintiffs.

As to the second objection, as regards the question of income tax deductions, I must find that the proper amount to be assessed for loss of wages is the gross amount due to each of the claimants from the company, without any deduction for income taxes or unemployment assessments retained by the company and paid over to the Government.

I find myself concluded by the judgment of Barlow J. in *Fine v. Toronto Transportation Commission*, *supra*, and the judgments in the English cases, *Fairholme v. Thomas Firth and*

John Brown, Limited (1933), 49 T.L.R. 470 and *Jordan v. Limmer & Trinidad Lake Asphalt Co. Ltd.*, [1946] 1 All E.R. 527. I do not think I can add anything to the reasoning therein to be found. We are concerned with the relationship between employer and employee, and not with matters between an employee and the Crown. This conclusion is well demonstrated in the case of Janet Foster herein, from whom erroneously was deducted very little for income tax and who had to make good to the Crown at the end of the year what to her must have seemed to be an enormous sum. Should she be allowed more damages than the others who had the correct amount taken off?

There is also this consideration, that many of these plaintiffs were only temporarily engaged in war work, and probably, either from the closing down of the plant, which followed in July, or because of the continuance of their injuries, they did not work a sufficient time in 1945 to bring them within the income tax category. Are they thus to be penalized?

I find, therefore, that the gross amount of wages is the proper basis of calculation.

Thirdly, dealing with the two minor matters above mentioned, I cannot see how the payments to Dr. Jeffrey can be assessed against the defendants. In all cases they were made by the Workmen's Compensation Board out of the Dominion Government funds. Dr. Jeffrey received nothing special for his services, having been paid a salary by his company. He performed the services in question as part of his ordinary duties as such employee. There is no reason why his company should benefit from the collision, and I disallow the claim made for his services in each case.

In regard to the claims for nursing, although they are not made for services of a professional nurse, and although in many cases the services were rendered voluntarily at first, as a friendly gesture, and then subsequently paid for, I believe that the expenses were reasonably incurred as the result of the injuries sustained by the negligence of the defendants.

Many of these claimants were in a bad way with not only domestic duties which were interrupted by the accident, but also the immobility caused by their injuries. There was a distinct disturbance of the normal lives of many of these plaintiffs as a

combination of housewife and war worker, which should be dealt with fairly liberally.

I therefore assess the damages suffered by the various plaintiffs as follows: [There follows a detailed assessment of each plaintiff's damages, amounting in all to \$32,257.82.]

In regard to costs, the plaintiffs joined together in one action headed by Mrs. Bowers, are entitled to their costs of the action, these costs to include the costs of any interlocutory motion over which I have jurisdiction. I am not aware of what time these became consolidated, but from that point on when they became one action there is to be one set of costs.

In regard to the action brought by Mrs. Sinclair, the plaintiff is to have the costs of this action paid by the defendants, together with the costs of interlocutory motions as aforesaid. The part played by this plaintiff was a comparatively minor one, and in the taxation of the bill in this case the taxing officer should bear this in mind. In my opinion the counsel fee should be based on an attendance of not more than three and one-half days.

Counsel subsequently appeared before the trial judge to settle the judgment, and the following additional reasons were delivered:

URQUHART J. [after quoting the first paragraph as to costs above]:—At the trial no argument was directed to me as to the time from which the costs of the consolidated action should be one. The object of this application was to settle the matter of costs.

On the application it was brought to my attention that Barlow J., on the 16th November 1945, in his order consolidating these actions (17 in number), including the transferring of nine of them from the County Court to this Court, provided as follows:

"5. AND IT IS FURTHER ORDERED that in the event of the plaintiffs becoming entitled to the costs of the consolidated action, they shall be entitled to one set of costs only, from the date of the issue of the writs."

Application for leave to appeal was made before Hogg J. on 30th November 1945, and I am advised that the point about costs was fully argued before him. Leave to appeal was refused.

I was unaware of these orders, or, in fact, that any prior disposition of the costs had been made, when I wrote my reasons herein.

I feel that I am bound by the above order of Barlow J. under the circumstances, and after argument I am convinced that his disposition of the matter is the correct one.

Under modern practice, where two or more causes of action arise out of the same accident and are in the hands of one solicitor, in my opinion all should be joined in one action from the outset. Particularly is this true in a case of this sort, where a number of persons travelling in a bus and all in the same boat, so to speak, are injured by a collision with another vehicle and all sue by the same solicitor, who is introduced by the personnel director of the plant in which the plaintiffs are employed.

See *Madill et al. v. Thompson*, [1939] O.W.N. 94. Mr. Justice Gillanders remarked in that case at p. 95:

"The practice here adopted of bringing two actions . . . is not one to be encouraged, and hence the award of one set of costs throughout is sufficient."

The endorsement on the record may be altered in accordance with the above. I have settled the minutes of judgment by making, in addition to changes agreed upon by counsel, a change in para. 5 embodying the above, but any other wording to express the above may be adopted.

These reasons shall be substituted for the first quoted paragraph of my reasons and the endorsement on the record has been altered accordingly. By agreement of counsel, the stay is extended until 10th July 1946.

Judgment accordingly.

Solicitors for the plaintiffs Winnifred Bowers and others: Day, Ferguson, Wilson & Kelly, Toronto.

Solicitor for the plaintiff Dorothy M. McDonald and agent for the Attorney-General of Canada: J. W. Pickup, Toronto.

Solicitors for the plaintiff Gertrude May Sinclair: Singer & Keyfetz, Toronto.

Solicitor for the plaintiff L. E. Mills: Hollis E. Beckett, Toronto.

Solicitors for the defendant J. Hollinger & Co. Limited: Shaver, Paulin & Branscombe, Toronto.

Solicitors for the defendant Toronto-Peterborough Transport Company Limited: Phelan, O'Brien & Phelan, Toronto.

Solicitors for the defendant General Engineering Co. (Canada) Limited: White, Bristol, Gordon, Beck & Phipps, Toronto.

[WELLS J.]

**Re The Religious Hospitallers of St. Joseph and
The City of St. Catharines.**

Municipal Corporations—Building Restrictions—Effect—Declaring Street to be “Residential”—Whether Construction of Hospital Prevented—The Municipal Acts, R.S.O. 1914, c. 192, s. 406(10); R.S.O. 1937, c. 266, ss. 406, 414(9)—The Municipal Amendment Act, 1941 (Ont.), c. 35, s. 13—History of Legislation.

A municipal by-law, passed under s. 406(10) of The Municipal Act, 1914, which declares a street “to be a residential street”, has not the effect of prohibiting the construction and maintenance of a hospital on that street, although it would probably prevent the building or operation of a store or manufacturing plant. *The City of St. Catharines v. Hulse*, [1926] O.W.N. 211, followed.

A MOTION for a declaration. The facts, and the nature of the declaration sought, are stated in the reasons for judgment.

22nd May 1946. The motion was heard by WELLS J. in Weekly Court at Toronto.

Hon. J. J. Bench, K.C., for the applicant.

M. A. Seymour, K.C., for the City of St. Catharines, respondent.

18th June 1946. WELLS J.:—This is an application on behalf of the religious order, under Rule 604 of the Rules of Practice and Procedure, for a declaration as to its rights under By-law no. 3346 of the City of St. Catharines, as amended by By-law no. 4134.

The applicant is the holder of an option to purchase Lots 948 and 949 according to corporation plan no. 2 of the city of St. Catharines, on the southerly and westerly side of Ontario Street, in the city of St. Catharines, between a point some 80 feet west of the westerly limit of Salina Street and the westerly limit of Elizabeth Street produced. The applicant proposes, if the permit is issued to it and the by-law in question does not prohibit the action, to demolish the existing buildings on these lots and to erect thereon a public hospital with an initial capacity of one hundred beds. It is proposed to allow for future enlargement to the extent of fifty more beds if it becomes necessary, and it is said that the total cost of the building will be somewhere between \$500,000 and \$530,000. Apparently a somewhat informal application for a permit was made to the City of St. Catharines by the Pigott Construction Company Limited of Hamilton, who are the proposed contractors for the applicant. This was done in

February of this year, and the city engineer, Mr. B. F. Lamson, immediately drew to the attention of the construction company that the portion of Ontario Street on which it was proposed to build was restricted to residences only, and pointed out that, in his opinion, an amendment to the city by-law would be required.

The by-law is that referred to here and was passed by the City of St. Catharines on the 18th April 1921. The by-law, which is no. 3346, is stated to be "A By-law to declare portions of Ontario Street, Salina Street, Ann Street, Adams Street, Midland Street, Welland Avenue and Elizabeth Street residential streets, and to prescribe the building line thereon". The preamble to the by-law is, I think, important. It is in part as follows:

"WHEREAS by sub-section 10 of Section 406 of The Municipal Act, it is enacted that By-laws may be passed by the Council (two-thirds of all the members voting therefor) for declaring any highway or part of a highway to be a residential street, and for prescribing the distance from the line of the street in front of it at which no building on a residential street may be erected or placed".

A petition from the owners of property on Ontario Street is recited which asked that portions thereof should be declared to be a residential street and that all intersecting streets to a depth of 120 feet also be declared to be residential streets, and to prescribe the building line thereon. The effective part of the by-law, in so far as the property under consideration is concerned, is para. 1, which was amended by By-law no. 4134, and, as amended, reads:

"1. THAT Ontario Street on the southerly or westerly side thereof, from a point eighty feet west of the westerly limit of Salina Street to the westerly line of Elizabeth Street produced, is hereby declared to be a residential street."

The amendment simply cut down the frontage affected by the original by-law by some eighty feet, otherwise there was no change.

The applicant asks for a declaration that the by-laws in question do not prohibit the applicant from establishing, building, maintaining and operating a public hospital upon the said lands, and, secondly, for a declaration that the by-laws do not prohibit the municipality from issuing to the applicant a building permit

for the erection and building by the applicant, its contractors and agents, of a public hospital on the lands in question.

There would appear to be no doubt that the applicant is entitled to have the matter it raises determined. This point was previously considered in the judgment in *Re W. J. Blainey Ltd. and The City of Toronto*, [1935] O.R. 476, [1935] 4 D.L.R. 328. In that case there was a motion under Rule 604 for a declaration that certain by-laws of the City of Toronto did not affect certain lands in relation to which the applicant held an option to purchase. Preliminary objection was taken that Rule 604 was not wide enough to permit the bringing of the application, and that the applicant had no status as it was merely the holder of an option. Mr. Justice Hope disagreed with both these contentions, and held that the words "other instrument" in Rule 604 were wide enough to cover a municipal by-law. He was also of the view that the applicant held an enforceable option for the purchase of the lands in question and as such was a person whose rights could be determined under Rule 604. A similar situation obtains here.

The problem that I am asked to consider, as I understand it, is, briefly, whether the declaration of the portion of Ontario Street by the municipality as a residential street prohibits the erection of the proposed hospital.

This by-law was passed by the municipality pursuant to subs. 10 of s. 406 of The Municipal Act, R.S.O. 1914, c. 192, which gave it power to pass by-laws for certain purposes. The subsection is as follows:

"10. For declaring any highway or part of a highway to be a residential street, and for prescribing the distance from the line of the street in front of it at which no building on a residential street may be erected or placed.

"(a) It shall not be necessary that the distance shall be the same on all parts of the same street.

"(b) The by-law shall not be passed except by a vote of two-thirds of all the members of the council."

This section was apparently originally passed in the year 1904 by the Legislature as an addition to The Consolidated Municipal Act of 1903, c. 19. The Act of 1903, by s. 541, being part of Division VI of the Act dealing with the protection of life and property, substantially gave power to deal with the erection

of buildings, scaffolding, size and strength of walls, and the erection of elevators. The section in question was added as s. 541a in the following year by s. 19 of The Municipal Amendment Act, 4 Edw. VII, c. 22. While I quite appreciate that the earlier form which this section took is no sufficient guide to the meaning of the section as it presently exists, it is, I think, of some interest to consider the form it took originally. Section 541a was as follows:

"541a. The Councils of cities and towns are authorized and empowered by a vote of two-thirds of the whole council to pass and enforce such by-laws as they may deem expedient;

"(a) To regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets or in different parts of the same street.

"(b) And in the case of cities only, to prevent, regulate and control the location, erection and use of buildings for laundries, butcher shops, stores and manufactories.

"The location, erection, construction or use of any buildings in contravention of any such by-law may, in addition to any other remedy provided by law, be restrained by action at the instance of the municipality passing such by-law;

"Provided that this section shall not apply to any buildings now erected or used for any of the purposes aforesaid so long as they continue to be used as at present."

In 1905, by s. 21 of The Municipal Amendment Act of that year, 5 Edw. VII, c. 22, para. (b) was amended by inserting the words "stables for horses for delivery purposes" before the word "laundries" in the third line. In 1907, by c. 40, s. 12, para. (b) was further amended by striking out the word "and" after the word "stores", and by adding at the end thereof the following words: "blacksmith shops, forges, dog kennels, hospitals or infirmaries for horses, dogs, or other animals."

The subsection in the form it had when this by-law was passed resulted from an amendment in the revision of The Municipal Act of 1913, 3-4 Geo. V., c. 43. In the revision of 1914 it appeared as s. 406(10) of c. 192, and in the revision of 1927 it appeared as subs. 8 of s. 406 of c. 233. It appeared in the 1937 revision of The Municipal Act, R.S.O. 1937, c. 266 as subs. 9 of s. 414 of that Act. By s. 14 of The Municipal Amendment Act

of 1941, 5 Geo. VI, c. 35 this provision was repealed and by s. 13 a new section was passed in substitution for s. 406 of The Municipal Act, setting up in effect a code for the exercise of the power to restrict the use of land in the municipality. Subss. 2 and 3 of s. 13 of the 1941 Act provide:

“(2) Any by-law heretofore passed for any of the purposes of paragraph 9 of section 414, paragraphs 2 to 10 of section 420, section 421, paragraphs 1 and 2 of section 423 or paragraph 6 of section 423 of *The Municipal Act* and in force on the day upon which this Act comes into force may with the approval of the Municipal Board be repealed or amended in accordance with section 406 of The Municipal Act as re-enacted by this Act.

“(3) Every by-law passed for any of the purposes of any provision repealed by this Act shall be deemed to be consistent with the provisions of section 406 of *The Municipal Act* as re-enacted by this Act and shall remain in full force and effect until amended or repealed.”

It was argued before me that the effect of the 1941 statute was a statutory approval of the by-laws in question, which was the equivalent of the approval of the Municipal Board. The purport of this argument is seen when s. 406 of The Municipal Act, as set forth in R.S.O. 1937, c. 266, is examined. This section, which was also repealed by the 1941 statute, was formerly s. 398 of The Municipal Act, as set forth in the revised statutes of 1927, and was apparently first passed in the year 1921, where it appears as s. 10 of c. 63 of the statutes of that year, 11 Geo. V. The effect of that amendment was to add it as s. 399a to The Consolidated Municipal Act, and it so appears in The Consolidated Municipal Act which was re-enacted in the following year, 1922, as 12-13 Geo. V, c. 72.

This section gave the municipality power to establish restricted districts or zones, and the first clause provides that the councils of municipalities may pass by-laws “For prohibiting the use of land or the erection or use of buildings within any defined area or areas or abutting on any defined highway or part of a highway except for such purposes as may be set out in the by-law.” This, of course, gives the municipality power to pass a restrictive by-law which might limit the type of building erected in any area.

It was provided that no by-law passed under this section should come into force or be repealed or amended without the approval of the Municipal Board, and directions were given that the council should notify all owners whose property was affected by any by-law passed under this section. This, of course, set up a method by which restrictive by-laws defining the kind and type of building in any area might be established. As I take it, the argument that the 1941 statute created a statutory approval of the by-law is an argument to the effect that the by-law is an exercise of the powers conferred on the municipality by this section.

With great respect to the argument advanced to me, I cannot see that approval of the by-law in question by the Municipal Board has anything to do with the matter, as what I have to consider is the meaning of the by-law in question, and the restrictive power the municipality had as a result of the section of The Municipal Act under which it was passed, and, of course, it was not passed pursuant to the section I have just discussed, giving the municipality power to establish restricted districts or zones. In fact, the by-law in question before me was passed by the City of St. Catharines on the 18th April 1921, and the section of the Act giving the municipality power to establish restricted districts or zones was not assented to until 3rd May 1921, some little time after the by-law in question came into being.

The only observation I have to make is that it would seem apparent that the enactment of the later section in 1921, giving a municipal council power to establish restricted districts or zones, fortifies the conclusion I have reached that there was not such a power given to the municipality by subs. 10 of s. 406 of The Municipal Act, R.S.O. 1914, c. 192, which was the statute under which and in pursuance of which the by-law before me was passed.

What then is the meaning of subs. 10 when it says that a by-law may be passed for declaring any highway or part of a highway to be a residential street? The matter has already been discussed by the Court of Appeal in the case of *The City of St. Catharines v. Hulse*, [1936] O.W.N. 211, [1936] 2 D.L.R. 453. There the by-law in question was passed pursuant to the same section as the by-law in the present matter. As in this case, it was pointed out that the by-law in question could not be

deemed to have been passed pursuant to s. 398, and the section covering the by-law in question, which was then subs. 8 of s. 406 of The Municipal Act, was discussed by the Chief Justice of Ontario, Sir William Mulock, as follows:

"Turning then to section 406(8) of The Municipal Act, which authorizes a municipal corporation to declare a highway to be a residential street, in order to determine the scope of the power which it purports to confer on the council, it is necessary to determine the meaning of 'residential street' as used in section 406(8). There is no statutory definition of what constitutes a residential highway. The term 'residential', although it suggests it, does not expressly limit to residences the use of buildings erected on a 'residential' street. People reside in private residences, hotels, apartment houses, boarding houses, hospitals, industrial homes, lunatic asylums, houses for the aged and blind, for children, etc. May buildings of these various kinds be erected on residential highways and be used for the purposes for which they are intended? If not, which are excluded? Does 'residential highway' mean a highway on which may be erected buildings to be used only as residences where an occupier may not carry on his calling or business, such as that of a doctor, a dentist, an artist, seamstress, a tailor, a masseur, a teacher or even an undertaker? The dictionaries do not with any reasonable degree of certainty, enable one to determine what is a residential highway. It is a highway substantially, but not exclusively, used for private residential purposes, its residential character being preserved. There are different kinds of residential highways. There may be on one highway none but high class dwellings occupied solely as private residences. While on another, although there may be such a proportion of private residences as give a residential character to the street, yet there also may be upon it many places used for other than residential purposes."

In the same case, Mr. Justice Middleton commented, at p. 214:

"The provisions of sec. 406(8) are singularly bald. All that the municipality is authorized to do is to declare a part of the highway to be a residential street, and to define a building line beyond which buildings may not be erected. What is meant by a residential street is in no way defined, and there is little

authority to throw light upon it. Murray's Oxford Dictionary speaks of 'residential' as adapted to houses of the better class, 'a neighbourhood characterised by houses of a superior kind', thus contrasting a residential district with a slum district, although in one sense in a slum there are many residences.

"In *City of Toronto v. Foss* (1913), 27 O.L.R. 612, at p. 613, [10 D.L.R. 627] Meredith J.A., speaking of a by-law passed under another section now repealed, says:

"It is quite plain that neither the by-law, nor the legislation upon which it is founded, was intended to be applicable to all kinds of work or trading; neither comprises shops of all kinds, nor businesses of all kinds. If the legislation had been meant to be as comprehensive as the plaintiffs contend for, it should, and doubtless would, have been embodied in very different language.

"No doubt, the purpose of the legislation was to prevent a residential street being turned into a business street; to preserve its residential character; all of which, however, can be done, as the legislation itself indicates, without decreeing that no trade or business of any kind shall be done in any house or building upon it."

"It was after this that the municipality was given the power now found in section 398."

It seems to me to be quite clear from these opinions, and indeed from a perusal of the section itself, in comparison with the section permitting the establishing of by-laws dealing with restricted districts or zones, that the meaning of "residential street" in the section under consideration does not in any way imply that buildings erected on the street must be limited to private residences. It does probably prohibit the erection and use of buildings for stores, manufacturing plants and processing plants of an industrial nature.

I do not think the designation of the street as "residential", however, was meant, nor should it be interpreted, as prohibiting the erection of a hospital on the street. There should, accordingly, be a declaration that the by-laws in question do not prohibit the applicant from establishing, building, maintaining and operating a hospital upon the lands in question, nor do the by-laws prohibit the municipality from issuing to the applicant a

building permit for the erection and building of a hospital on the lands in question.

The municipality should pay the applicant's costs of the application.

Order accordingly.

Solicitors for the applicants: Bench, Keogh, Rogers & Grass, St. Catharines.

[COURT OF APPEAL.]

Rex v. Hilborn.

Criminal Law — Murder and Manslaughter — Culpable Homicide — Unlawful Act — Administration of Sedative — The Criminal Code, R.S.C. 1927, c. 36, ss. 252, 260.

The accused's son, aged eight, died as the result of a dose of phenobarbital administered to him by the accused. The accused admitted that he had originally intended to kill himself, his wife, and his three young children, by administering this drug, but said that when he came to give it to the children he changed his mind, and, although he retained the intention to commit suicide, he decided to give the children a smaller dose, sufficient, as he thought, merely to put them into a deep sleep and to lessen their terror and distress on waking to find him dead. The accused and the other members of the family recovered, and a charge of murder was laid. The jury convicted of manslaughter, and the accused appealed.

Held, the appeal must be dismissed. To argue that the trial judge should have defined criminal negligence in his charge to the jury, and pointed out the high degree of negligence required to justify a conviction for manslaughter, was to approach the case in the wrong way. The trial judge had clearly defined culpable homicide to the jury, and the administering of this potentially dangerous drug to the boy was, in the circumstances, an unlawful act. The boy was not in need of any drug or medicine. The accused's whole conduct was based upon his intention to commit the crime of suicide, and was unlawful.

Criminal Law — Trials — Position of Crown and Defence Counsel — Impropriety of Comment to Jury on Difference in Positions and Functions of Counsel.

It is improper for Crown counsel, or the trial judge, to draw the jury's attention to the difference between the position and functions of Crown counsel and those of counsel for the defence, and to point out that, while the object of defence counsel is to secure an acquittal, Crown counsel is "part of the Court", and occupies a "quasi-judicial" position. Such remarks by Crown counsel, when followed by criticisms of counsel for the defence, are in particularly bad taste and unfair, and may in some cases be ground for setting aside the verdict.

AN APPEAL from a conviction for manslaughter, on a trial for murder before Barlow J. and a jury, and from the sentence of 18 years' imprisonment.

13th and 14th June 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and HOGG JJ.A.

Vera L. Parsons, K.C., for the accused, appellant: 1. The trial judge failed to point out to the jury the distinction between civil and criminal negligence; he used the words "reckless" and "negligent" as synonymous, which was wrong; *Rex v. Greisman*, 59 O.L.R. 156, 46 C.C.C. 172, [1926] 4 D.L.R. 738. The Crown had charged murder, and gave evidence to establish an intent to kill. The defence was that, although the accused originally intended to kill the children, he later changed his mind, and did not have that intention when he administered the pills. If this story was accepted, he could be guilty of manslaughter only if the jury found that he had been guilty of criminal negligence, and it was therefore essential that that offence should be properly defined: *Rex v. Large* (1939), 27 Cr. App. R. 65. [ROBERTSON C.J.O.: If the trial judge properly instructed the jury as to culpable homicide, I can see no reason for going into criminal negligence at all.] The principles which I submit are applicable are laid down in the headnote to *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576, [1937] 2 All E.R. 552. The trial judge here told the jury that it did not matter if the accused thought that the drug, in the dose which he gave, was not dangerous. There cannot be manslaughter in the abstract. Even on a charge of murder, there cannot be a conviction for manslaughter, in circumstances like the present, unless criminal negligence is established: *Reg. v. Doherty* (1887), 16 Cox C.C. 306; *Rex v. Roberts*, 28 Cr. App. R. 102, [1942] 1 All E.R. 187. [ROBERTSON C.J.O.: Surely a conviction for manslaughter in this case could properly be based on an "unlawful act", as set out in s. 252 of The Criminal Code, R.S.C. 1927, c. 36, without any idea of negligence at all. The accused had no right to give this drug to his children, who were perfectly well, when he knew that it was dangerous.] I submit that the drug, in small quantities, is beneficial, on the evidence, and that the accused had a legal right to give them a non-dangerous quantity, for such a purpose as he says he had.

2. The trial judge read s. 246 of The Criminal Code to the jury, and this section is clearly inapplicable. It applies only to a medical man or others who hold themselves out as such, and is predicated upon the existence of illness in the person to whom treatment is administered. The trial judge merely read it to the jury, without explaining it in any way. Even if s. 246 were

applicable, it also requires proof of negligence amounting to a felony: *Rex v. Williamson* (1807), 3 C. & P. 635, 172 E.R. 579; *Reg. v. Spencer* (1867), 10 Cox C.C. 525; *Rex v. Watson*, 50 B.C.R. 531, 66 C.C.C. 233, [1936] 2 W.W.R. 560, [1936] 4 D.L.R. 358; *Rex v. Bower*, [1941] O.R. 51, 75 C.C.C. 323, [1941] 2 D.L.R. 269.

3. The negligence, if any, established in this case did not amount to criminal negligence; the accused, according to the evidence, was an intelligent and loving father. I rely on *Akerele v. The King*, [1943] A.C. 255 at 262, 265, [1943] 1 All E.R. 367, [1943] 3 W.W.R. 167, and *Rex v. Baker*, [1929] S.C.R. 354, 63 O.L.R. 641, 51 C.C.C. 352, [1929] 2 D.L.R. 282.

4. The principal defence was insanity, and the trial judge told the jury that they must come to a conclusion "whether the accused . . . is insane or sane within the meaning of The Criminal Code". This was misdirection, as it would lead the jury to consider the question of the accused's sanity at the time of the trial, which was not in issue.

5. The trial judge did not properly present the accused's defence, apart from insanity, to the jury. He dealt with it very briefly, and said nothing about the evidence that pheno-barbital was beneficial in small quantities, or the evidence as to known instances of very large numbers of such pills taken without fatal results, or about the accused's own previous experience with the use of the drug. He told them that it made no difference that the dead boy, because of weak kidneys, was particularly susceptible to the drug, or had an idiosyncrasy to it: *Akerele v. The King*, *supra*.

6. The trial judge told the jury that they might acquit if they came to the conclusion that the dose the accused gave the boy was "not dangerous". This was clearly wrong, and the direction should have been that they might acquit if they found that the dose was one which the accused, on reasonable grounds, believed was not dangerous.

7. Counsel for the Crown, in his address to the jury, drew attention to the difference between his functions and those of counsel for the defence, and said that he was "part of the Court", and "acting in a quasi-judicial capacity", and the trial judge, in his charge, made similar remarks. This is directly within what was condemned by this Court in *Rex v. Ferguson*, [1945] O.W.N. 1, 83 C.C.C. 23, [1945] 1 D.L.R. 767.

8. Crown counsel made three statements to the jury as to the evidence which were incorrect, and although they were drawn to the trial judge's attention, he did not correct them.

9. As to sentence: The trial judge, in discussing the law as to murder, told the jury that poisoning is a most detestable form of killing, and he repeated these words in sentencing the accused. These words are taken from Archbold, Criminal Pleading, Procedure and Evidence, 31st ed. 1943, p. 867. He clearly interpreted the verdict as meaning something very close to murder, and sentenced accordingly. But the verdict here, having regard to the charge, might well have meant criminal negligence only, and the accused should have received the benefit of the doubt in this respect. [ROBERTSON C.J.O.: The trial judge heard the evidence, and surely made up his own mind as to the seriousness of the offence.] *Rex v. Leaf*, 20 Sask. L.R. 542, 45 C.C.C. 236, [1926] 1 W.W.R. 888, is a case where the Court, in sentencing, considered other provisions of the Code relating to somewhat similar offences.

W. B. Common, K.C., for the Crown, respondent: The trial judge, when he dealt with recklessness or negligence, clearly had in mind s. 259(b), relating to murder, and not criminal negligence at all. The administering of these pills, to a child who was not ill, was an unlawful act—it was a trespass. [LAIDLAW J.A.: Surely the jury must decide that question on the basis of what the accused knew or believed. If he believed that the dose he was giving was not dangerous, was the act unlawful?] The purpose for which it was given is important—it was part of a scheme of attempted suicide. The accused's actions must be judged, not according to what was in his own mind, but according to the ordinary relationship between parent and child. [HOGG J.A.: Do you argue that his knowledge of danger was immaterial?] No, but he did know that the pills were dangerous if taken in sufficiently large quantities. No parent, in the circumstances outlined by the accused here, has a right to drug his children, merely to spare them from shock. In such circumstances, the giving of even one pill would be an assault.

The question of criminal negligence does not arise in this case at all. The trial judge correctly charged the jury as to culpable homicide under s. 252, and left it to them to find whether there was an unlawful act. We cannot know the basis on which the jury arrived at its verdict. The cases cited on criminal

negligence are entirely different in their facts. The fundamental thing here is the accused's original intention to wipe out the whole family.

The error in the direction as to insanity was immaterial. No issue was directed as to the accused's sanity at the time of the trial, and the judge's slip here could not possibly have affected the minds of the jury. The rest of his charge on this point made it quite clear what the issue was.

Every solicitor is an officer of the Court, and if he is true to his oath he must do his utmost to see that justice is done. Nothing in Crown counsel's address here could be called inflammatory, and the accused could not have been prejudiced. The remarks on this subject in *Rex v. Ferguson, supra*, were obiter, and not the basis for the decision, and this case is not at all comparable to *Rex v. Merritt*, [1934] O.R. 392, 62 C.C.C. 57.

The slight misstatements of fact in counsel's address were trivial, and could not have affected the result.

Having regard to all the circumstances of this case, particularly to the fact that there can be no doubt that the death was caused by the act of the accused, the conviction should be sustained. If, however, the Court feels that a new trial should be granted, it cannot be had on the same indictment, since the jury has impliedly acquitted of murder, which was the only offence charged: *Rex v. MacDonald*, [1943] O.R. 158, 79 C.C.C. 133, [1943] 2 D.L.R. 640.

The sentence should not be interfered with. Severity is not of itself a ground for reduction by this Court, unless there is an error in principle.

Vera L. Parsons, K.C., in reply, referred, in connection with Crown counsel's misstatements of fact, to *Rex v. Walker and Chinley* (1910), 15 B.C.R. 100, 16 C.C.C. 77, 13 W.L.R. 47.

Cur. adv. vult.

20th June 1946. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by the appellant from his conviction on 15th February 1946 of manslaughter, on his trial on a charge of murder, before Barlow J. The appellant also appeals from the sentence of eighteen years' imprisonment imposed upon him by the trial judge. The appellant's wife was charged with him, but was acquitted.

The appellant had formed the intention of killing himself and his wife and his three young children. He intended to bring this about by administering pheno-barbital, a drug not uncommonly used as a sedative, in the form of tablets. An overdose of the drug may be dangerous, and even fatal. The appellant made somewhat elaborate preparations for the event, both in the way of business documents dealing with insurance, including insurance on the children, and making his own will, and by way of letters addressed to a brother, and another to the clergyman who was to be asked to attend the burials. There were a number of other acts of preparation which it is unnecessary to detail. It is not in dispute that the appellant proceeded further and administered pheno-barbital in considerable quantity to his wife and three children, as well as to himself. It is also not open to serious question that one of the children, a boy of eight years of age, with whose murder he is charged, died as the result of the administration of this drug to him by the appellant.

The appellant, who himself gave evidence, says that while he had formed the intention to bring about the death of his wife and children, as well as his own death, by administering the drug, he modified this intention when he came actually to administer the drug to the children. He says he decided to lessen the quantity that he had prepared to give them, and actually gave them only such quantity as, according to his intention, would put them into a heavy sleep and have the effect of dulling their sense of terror and grief on waking and finding him dead.

On the next morning occupants of other parts of the dwelling-house in which the appellant and his family lived, being alarmed at seeing no signs of life about the appellant's quarters, investigated and found all the members of the family in a deep sleep, from which they could not be aroused. Medical and other assistance was obtained, and efforts were made to revive the several members of the family by the use of inhalators and other methods. The doctor, upon his arrival, pronounced Brian Hilborn dead. The other members of the family, including the appellant himself, finally responded to treatment, and all of them recovered.

Upon the argument of the appeal, counsel for the appellant took a number of objections in regard to the proceedings at the trial, mainly based upon the charge of the learned trial judge to

the jury. Her chief objection to the charge was that the trial judge had not told the jury that if they accepted the appellant's statement that when he came to administer the drug to the children, he altered his intention, and instead of administering the quantity that he had intended to give them to produce a fatal result, he had given a smaller quantity, intending that it should have the effect of producing a heavy sleep and a continued drowsiness on awakening, so that their disturbance by his own suicide might be lessened, the appellant's guilt would, in such case, depend upon whether he had been guilty of criminal negligence in administering the quantity actually given. It was argued that the trial judge had not defined criminal negligence, nor distinguished between the different degrees of negligence, not all of which are criminal, and had failed to point out to the jury, although asked to do so, the high degree of negligence required to support a verdict of manslaughter.

Counsel for the appellant developed this line of argument at considerable length, and pressed it with much ingenuity and force. I am of the opinion that this is not the proper approach to the case in hand. The appellant was charged with the murder of his child. The jury—perhaps mercifully—did not find him guilty of murder, but did convict him of manslaughter. They found that his conduct amounted to culpable homicide, which had been clearly defined to them by the learned trial judge. In my opinion, on the appellant's own story the administering by him to a boy of eight years of this potentially dangerous drug was, in the circumstances, an unlawful act, and its result was the killing of the boy, Brian Hilborn. The boy was not in need of any drug or medicine. The appellant does not suggest that he was. The appellant's statement is that he himself intended to commit suicide, and that he administered the drug to the child because of that—to lessen somewhat the effect his father's death might have upon the child. He knew the drug was a dangerous drug. He admits that he had at first intended to administer a dose that would be fatal. He did, in fact, administer a dose that was fatal. I am wholly at a loss to understand upon what theory this was anything other than an unlawful act. His whole conduct was unlawful. To keep within the law, and to have occasioned his children no risk or danger of harm, all he had to do was to refrain from committing the crime of suicide. The fact that he intended to commit that crime

was no justification or excuse for administering to his child, who did not need it, a large dose of a dangerous drug, or indeed any dose at all.

This case, in its facts, does not in the least resemble the case of a medical doctor or a parent, who, intending it for the child's good, by mistake administers the wrong medicine, or gives too large a dose. The appellant's whole course of conduct, upon his own account of it, was dictated by a criminal purpose to commit suicide, and was unlawful.

Objection was also taken by the appellant that counsel for the Crown had improperly emphasized to the jury the distinction that he alleged to exist between his position, as counsel for the Crown, and the position of defence counsel, and it was further objected that the trial judge had given this some countenance in the course of his charge. We have, in this Court, on more than one occasion expressed our disapproval of such observations to the jury. If the course of conduct of counsel for the Crown is what it should be, there will be no occasion to call the attention of the jury to it. Such remarks, coming from counsel for the Crown, when followed by criticisms of the conduct of counsel for the defence, are in particularly bad taste and unfair. It is highly unlikely that the jury were affected in this case by these remarks, but in some other case they might well be ground for setting aside the verdict.

None of the other points taken for the appellant requires further discussion than was had upon the argument. The appeal from the conviction should be dismissed.

So far as the sentence is concerned, the case is an unusual one. Insanity was set up as a defence, but the jury found against it. There is much in the evidence to lead one to think that the appellant is a most unusual man. His general conduct, in some respects, is hard to understand, and it is difficult to form a judgment of the quality of the man. Upon the whole it would seem to be a case in which it would be unwise for this Court to interfere with the sentence imposed by the trial judge, and the matter should be left for the exercise of executive clemency, in case it should hereafter appear to be a proper case for it.

Appeal dismissed.

Solicitors for the appellant: Horkins, Graham & Parsons, Toronto.

Solicitor for the Crown, respondent: C. L. Snyder, Toronto.

[COURT OF APPEAL.]

Re Rex v. Thompson.

Prohibition—Right of Appeal—Prohibition Arising in Criminal Matter—Proceedings under The Army Act, 1881 (Imp.), c. 58, leading to Punishment of Soldier.

Where an order is made prohibiting the military authorities from proceeding with charges against a soldier under the Imperial Army Act (made part of the law of Canada by The Militia Act), there is no right of appeal from that order to the Court of Appeal. These provisions of The Army Act are clearly criminal law, since certain defined conduct is made an offence and punishable with imprisonment. *Mann v. Owen et al.* (1829), 9 B. & C. 595; *Proprietary Articles Trade Association et al. v. Attorney-General for Canada et al.*, [1931] A.C. 310; *Amand v. Home Secretary et al.*, [1943] A.C. 147; *Rex v. Justices of the London Appeals Committee*, [1946] 1 K.B. 176, applied. Prohibition is a matter of procedure, and has the character of a civil or criminal proceeding, according to the nature of the matter sought to be prohibited. *Rex v. Nat Bell Liquors Limited*, [1922] 2 A.C. 128; *Mitchell v. Tracey and Fielding* (1919), 58 S.C.R. 640; *Amand v. Home Secretary et al.*, *supra*, applied. The Provincial Legislature has accordingly no power to grant a right of appeal in such a case. *In re Storgoff*, [1945] S.C.R. 526, applied. No right of appeal having been provided for by any Dominion legislation, it follows that the Court of Appeal is without jurisdiction to entertain an appeal.

AN APPEAL by the Attorney General for Canada from an order of Urquhart J., [1946] O.W.N. 217, prohibiting the taking of certain proceedings by the respondent's commanding officer.

The earlier proceedings in this matter are set out in the report of an application for discharge upon *habeas corpus*, *ante*, p. 77, 1 C.R. 60. Following the order of LeBel J., the respondent was discharged from custody, informed that he had been transferred to another unit, the Kent Regiment, and immediately re-arrested. His new commanding officer proposed to take further proceedings leading to the respondent's trial by court-martial for the same offences.

15th and 16th April 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

H. M. Rogers, K.C., for the respondent, took a preliminary objection that the Court was without jurisdiction, on the grounds: (1) that there was no right of appeal from such an order as was here in question; (2) that the administration of justice being within the legislative sphere of the Province, the only proper person to appeal and appoint counsel, if there was a right of appeal, was the Attorney-General for the Province.

[THE COURT directed counsel to proceed with the argument on the merits, deferring consideration of the preliminary objec-

tion. The argument is noted, however, only in so far as it deals with the right of appeal.]

This is a criminal matter. The test is the nature of the proceedings, not necessarily the legislative authority under which they are taken: *In re McNutt* (1912), 47 S.C.R. 259 at 266-7, 21 C.C.C. 157, 10 D.L.R. 834, 13 E.L.R. 109, 49 C.L.J. 117; *Rex v. Jackson* (1917), 40 O.L.R. 173, 29 C.C.C. 352.

There is clearly no right of appeal in England in matters of prohibition arising in criminal cases: *Rex v. Garrett*; *Ex parte Sharf et al.*, [1917] 2 K.B. 99; *Re Clifford and O'Sullivan*, [1921] 2 A.C. 570, particularly at pp. 580, 588. Sections 18(4) and 40 of The Army Act, 1881 (Imp.), c. 58, are undoubtedly criminal law, and in any case these offences are made part of the law of Canada by a Dominion statute, The Militia Act, R.S.C. 1927, c. 132 [ROBERTSON C.J.O.: Does that mean that all charges for these offences under military law must be tried in the civil courts, and prosecuted by the Provincial authorities?] They should be, but I do not think the point has ever arisen.

What is criminal law for purposes of prohibition is defined in *Mitchell v. Tracey and Fielding* (1919), 58 S.C.R. 640 at 647, 46 D.L.R. 520.

Since prohibition arising in a criminal matter is itself criminal, the provisions of The Judicature Act, R.S.O. 1937, c. 100, as to appeals are inapplicable: *In re Storgoff*, [1945] S.C.R. 526, [1945] 3 D.L.R. 563, 84 C.C.C. 1 (*sub nom. Rex v. Storgoff*). There is no Dominion legislation providing for such an appeal.

[ROBERTSON C.J.O.: The Army Act, and The Militia Act, come under a separate head of The British North America Act. If these are to be regarded as disciplinary rather than criminal proceedings, what is your argument about the right of appeal?] The mere fact that a man dons a uniform does not deprive him of his civil status. If these laws have any force with respect to him within Ontario, it must be by virtue of the Dominion's power to legislate as to criminal law. The Dominion has said that the criminal law will be considerably more strict for soldiers than for civilians. [ROBERTSON C.J.O.: Do you say that any offence created by The Army Act, and punishable by fine or imprisonment, is a crime?] Yes.

9 Halsbury, 2nd ed. 1933, p. 740, note (x), says what is a criminal cause or matter within the English Judicature Act, and the same law has been applied in Canada: see *In re McNutt*,

supra, at pp. 263, 266, 284. *Re MacKenzie*, [1945] O.R. 787, [1946] 1 D.L.R. 584, 85 C.C.C. 233 (*sub nom. Rex v. MacKenzie*), is clearly distinguishable.

D. L. McCarthy, K.C. (*G. B. Bagwell* with him), for the appellant: In 1868, by what is now s. 69 of The Militia Act, R.S.C. 1927, c. 132, Parliament incorporated the Imperial Army Act into Canadian law. Many Parliaments have sat since that time, and that is still the law. The legislation as to military courts and tribunals is a necessary incident of the power to legislate respecting the militia, etc. There is a clear distinction between army courts and the civil courts.

The right of appeal exists unless the matter is criminal in the strict sense. English jurisprudence is unanimous on this point. [ROBERTSON C.J.O.: But in England there is no question of legislative authority. In Canada, military matters are within the jurisdiction of the Dominion Parliament. What right has the Province to provide for an appeal by legislation such as The Judicature Act? Does not *In re Storgoff*, *supra*, apply?] That case was clearly criminal.

Cur. adv. vult.

24th June 1946. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by the Attorney-General for Canada from the order of Urquhart J., [1946] O.W.N. 217, dated 23rd January 1946, prohibiting the officer commanding the Kent Regiment from taking or directing, ordering or requesting the taking of any further proceedings in respect of a charge under s. 18(4) and two charges under s. 40 of The Army Act, 1881 (Imp.), c. 58, against Corporal George Hector Thompson, the present respondent, and in particular from taking or directing the taking down of evidence in writing, or remanding the accused for trial by court-martial, or convicting the accused in respect of the said charges.

The charges against the respondent are one of stealing public property and two of conduct to the prejudice of good order and military discipline, in that he was improperly in possession of public property. The charges are all of offences against The Army Act, punishable by imprisonment.

Two preliminary objections were taken on behalf of the respondent at the opening of the appeal. The first objection

taken was that no appeal lies to the Court of Appeal from the order of prohibition made by Urquhart J. The second objection was that in any event there is no right of appeal by the Attorney General for Canada, and that if any appeal lies, the right of appeal is in the Attorney-General for the Province of Ontario. I shall proceed to discuss the first of these two preliminary objections.

The respondent says that the order of Urquhart J. was made in a criminal matter, in regard to which the jurisdiction to legislate is in the Parliament of Canada, and that Parliament has not granted any right of appeal to the Court of Appeal from such an order. It is obvious that if the respondent is right in this, it is of no consequence what opinions this Court may have as to the propriety or wisdom of the order of Urquhart J., or even of his jurisdiction to make the order. The proceeding by way of appeal is not before a Court that has jurisdiction to entertain it.

Much that counsel for the respondent argued in support of his objection is already covered by decisions that are binding upon this Court. To begin with, the provisions of The Army Act, upon which the proceedings taken against the respondent are based, are criminal law. Certain defined conduct is made an offence, and is punishable with imprisonment. "The proper definition of the word 'crime' is an offence for which the law awards punishment": *Mann v. Owen et al.* (1829), 9 B. & C. 595 at 602, 109 E.R. 222; *Proprietary Articles Trade Association et al. v. Attorney-General for Canada et al.*, [1931] A.C. 310 at 324, [1931] 2 D.L.R. 1, 55 C.C.C. 241, [1931] 1 W.W.R. 552. Lord Wright, in the course of his judgment in *Amand v. Home Secretary et al.*, [1943] A.C. 147 at 162, [1942] 2 All E.R. 381, said: "The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a 'criminal cause or matter.'" See also *Rex v. Justices of the London Appeals Committee*, [1946] 1 K.B. 176.

While it is true that, notwithstanding the broad terms in which "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal

Matters" is assigned to the exclusive legislative authority of the Parliament of Canada by s. 91(27) of The British North America Act, some measure of jurisdiction in respect of criminal law is reserved to the Provinces by s. 92(15), it is plain that the Provinces have no jurisdiction over such matters as are dealt with by The Army Act. They come within s. 91(7), "Militia, Military and Naval Service and Defence". The Army Act, 44 & 45 Vict. (Imp.) c. 58, is made part of the law of Canada by The Militia Act, R.S.C. 1927, c. 132, s. 69.

The significance of this for the present purpose lies in the fact that prohibition is a matter of procedure, and has the character of a civil or criminal proceeding, according to the nature of the matter sought to be prohibited: *Rex v. Nat Bell Liquors Limited*, [1922] 2 A.C. 128 at 168, 65 D.L.R. 1, 37 C.C.C. 129, [1922] 2 W.W.R. 30; *Mitchell v. Tracey and Fielding* (1919), 58 S.C.R. 640, 46 D.L.R. 520; *Amand v. Home Secretary et al.*, *supra*. The order of prohibition made by Urquhart J. is, therefore, made in a criminal matter, the procedure in respect of which is within the exclusive jurisdiction of the Dominion Parliament. The Provincial Legislature has no power to grant a right of appeal in such case: *In re Storgoff*, [1945] S.C.R. 526, 84 C.C.C. 1, [1945] 3 D.L.R. 673 (*sub nom. Rex v. Storgoff*).

The appellant, by a memorandum submitted since the argument, puts forward the pre-confederation statute, being c. 13 of the Consolidated Statutes of Upper Canada, 1859, which, he contends, gives a general criminal jurisdiction to the Court of Error and Appeal constituted by that statute. He further submits that the jurisdiction so vested in the Court of Error and Appeal has been continued in the Supreme Court of Ontario, and is now exercisable by this Court. The jurisdiction of the former Court of Error and Appeal under the statute referred to was, however, a definitely limited one. It was held in *Whalen v. The Queen* (1869), 28 U.C.Q.B. 108, that the right of appeal in criminal matters so provided for was confined to such appeals as arose under the Act respecting new Trials and Appeals and Writs of Error in Criminal Cases in Upper Canada, C.S.U.C. 1859, c. 113. The right of appeal under these statutory provisions did not extend to prohibition in a criminal case. They dealt with cases "When a person has been convicted of any treason, felony or misdemeanour, before a Court of Oyer and Terminer, or Gaol

Delivery, or Quarter Sessions". The sections granting this limited right of appeal in criminal matters were repealed by s. 80 of the Dominion statute, 32-33 Vict., c. 29 (1869).

As the provisions of The Judicature Act, R.S.O. 1937, c. 100, relating to the jurisdiction of this Court, are not derived from any pre-confederation statute, at least in so far as appeals in criminal matters are concerned, and as the Province has no legislative jurisdiction in the matter, the preliminary objection to the jurisdiction of this Court to entertain this appeal is well taken. This Court is without jurisdiction to hear the appeal.

The appeal should, therefore, be formally dismissed as not being within our jurisdiction to entertain. The respondent is entitled to costs of the appeal.

Appeal dismissed with costs.

Solicitor for the appellant: G. B. Bagwell, Toronto.

Solicitors for the respondent: Bench, Keogh, Rogers & Grass, St. Catharines.

[WELLS J. AND MCRUER C.J.H.C.]

Streit v. Swanson et al.

Companies—Directors—Invalidity of Election—Duties of de facto Directors—Powers of Court—The Companies Act, R.S.O. 1937, c. 251, s. 47.

Persons who have acted as directors of a company, even if their election is invalid, have, as *de facto* directors, not only the power but a duty to convene a general meeting of shareholders for the purpose of properly constituting the board. *Re Owen Sound Lumber Co.* (1915), 34 O.L.R. 528, affirmed in this respect (1917), 38 O.L.R. 414, applied. *Semble*, s. 47 of the Ontario Companies Act applies in the case of such *de facto* directors, and if, having received a requisition of the shareholders under that section, they fail to take action to protect the interests of the company, it may validly be convened by the requisitioning shareholders.

Where the provisions of s. 47 have not been invoked, the Court will not, in an action against the *de facto* directors, exercise its special powers by granting an interlocutory mandatory order requiring them to convene a meeting.

Where a company is not before the Court, the action being brought against the *de facto* directors only, the Court has no power to order the convening of a shareholders' meeting, since there is no party to the action whom the Court can order to act in a corporate capacity in respect of the company's affairs. *Bainbridge v. Smith* (1899), 41 Ch. D. 462; *Pender v. Lushington* (1877), 6 Ch. D. 70; *Leavens v. Great West Permanent Loan Company et al.* (1927), 36 Man. R. 606, distinguished.

A MOTION to continue an interim injunction.

29th and 30th May 1946. The motion was heard by WELLS J. in Weekly Court at Toronto.

G. A. Gale, K.C., for the plaintiff, applicant.

A. G. Slaght, K.C., for the defendants, *contra*.

8th June 1946. WELLS J.:—This is an application on behalf of the plaintiff suing on his own behalf and on behalf of all shareholders of Yellowknife Gold Mines Limited against the four defendants, who are the directors of Yellowknife Gold Mines Limited. The application is for the continuance of an interim injunction granted on the 23rd day of May, restraining the defendants “(a) from acting or purporting to act in any way as directors or officers of Yellowknife Gold Mines Limited and (b) from issuing or allotting any shares of the said Yellowknife Gold Mines Limited which were not actually issued and allotted at the time of the opening of the Annual General Meeting of the shareholders of Yellowknife Gold Mines Limited on the 17th day of May, 1946”; and for a further order restraining the defendant Swanson, or any other person acting as chairman of the meeting of shareholders from accepting or counting votes polled in respect of the shares of the company issued subsequent to the 17th May, and for an order requiring the defendants Swanson and Gardner to reconvene the meeting and for the appointment of a shareholder other than the defendant Swanson to act as chairman of the meeting.

This application arises out of the proceedings at an annual general meeting of Yellowknife Gold Mines Limited which was held on the 17th May 1946, following a special general meeting on the same day, and which, according to the notice sent out, was to be held for the purpose of receiving and considering the statement of accounts and balance sheet of the company for the period ending 31st December 1945, and the report of the directors and auditors, for the election of directors and appointment of officers, for the consideration, and, if approved, ratification and confirmation of all by-laws, acts and proceedings of the board of directors made and done since the previous annual meeting of the shareholders, and, if thought fit, to approve the action of the board of directors in settling the action brought by one J. J. Gray against the company and Bear Exploration and Radium Limited.

The action referred to in the notice sent to the shareholders as being brought by J. J. Gray against the company and Bear Exploration and Radium Limited had apparently been settled by the directors who are the defendants in these proceedings. There was placed before me a copy of the agreement containing the terms of settlement which appears to have been executed by Yellowknife Gold Mines Limited, J. J. Gray and Bear Exploration and Radium Limited. One of the clauses of this agreement containing the settlement was para. 7, which is as follows:

“7. Yellowknife agrees to call a Special General Meeting of its shareholders forthwith to be held not later than the 20th day of May, 1946, to confirm By-law Number 67 of the Company increasing the number of Directors from three to five and to confirm this agreement and to call an Annual Meeting of the Company to be held at the same place immediately following the said Special General Meeting for the election of Directors and such other business as may properly be brought before an Annual Meeting. B.E.A.R. and Gray agree that they will vote all shares owned or controlled by them at the said meeting to confirm the said By-law Number 67 and to confirm this agreement.”

As appeared from the material filed on the argument before me, there was urgency from the company's viewpoint in holding both the special and the general meeting referred to in the agreement. There apparently was considerable doubt as to whether the company properly had five directors or not, an attempt having been made to increase the number from three in the year 1934, in which the procedure adopted appeared to be open to question. In consequence, the special general meeting of the shareholders of Yellowknife Gold Mines Limited was held on the 17th May, for the purpose of properly ratifying a by-law increasing the number of directors from three to five. This was the only action taken at the special general meeting, despite the provisions of the agreement of settlement between Gray, Yellowknife Gold Mines Limited and Bear Exploration and Radium Limited, which contemplated that the agreement of settlement should be dealt with at such meeting. No explanation of this change was given, but it was a matter within the control of the defendants. As appears from the notices and material sent out, it was proposed to deal with the agreement of settle-

ment, which, by its terms, had to be confirmed by the shareholders of Yellowknife Gold Mines Limited, at the annual general meeting.

It is quite obvious from the agreement of settlement that from the company's viewpoint and that of the shareholders it was important that the agreement of settlement should be dealt with before the 30th May 1946, if at all possible.

It would also appear to be equally important from the viewpoint of the shareholders that properly constituted directors should be conducting the affairs of this company, as there seems to be considerable doubt as to the powers and status of the present directors.

I have had filed before me on behalf of the defendant a transcript of what took place at the annual general meeting. This is not verified by the affidavit of the reporter who took it down, but, with certain exceptions which Mr. Gale raised, it seems to have been treated by both parties as a fair account of the proceedings. It is quite obvious from reading these proceedings that no attempt was made to deal with any of the important matters which the shareholders had been called together to consider.

Immediately upon the meeting being constituted, a shareholder by the name of Sweeney, who, I am advised, is the holder of 25 shares, moved that the meeting adjourn to the 12th September 1946. In view of the disposition I propose to make of this matter, it is not necessary for me to go into the proceedings of this meeting, but it is obvious that in respect of the matters which were of vital interest to the shareholders no discussion was permitted.

A great deal of the proceedings, which filled some 53 pages of transcript, dealt with the question of proxies, the question of the right to vote, and the advisability of proceeding with the agreement of settlement which had not been properly placed before the meeting by the chairman, and which, from the discussion which ensued, could not possibly have been understood by the shareholders present. No attempt whatever was made to elect new directors.

As appears by the affidavit filed on behalf of the defendant, the action brought by J. J. Gray against Yellowknife Gold Mines Limited and Bear Exploration and Radium Limited will again

proceed at the non-jury sittings of this Court on the 10th June next.

It seems to me that the matters which arise out of the application before me are inextricably mixed up with the matters which must arise out of the agreement reached before the trial judge in that trial, in pursuance of which the adjourned meeting, which is the subject of these proceedings, was called.

Under these circumstances, I think the proper disposition for me to make of this application is to adjourn it to the judge presiding in the non-jury sittings of this Court at Toronto with the direction that this motion be placed on the list immediately after the case in which J. J. Gray is plaintiff and Yellowknife Gold Mines and Bear Exploration and Radium Limited are defendants. In the meantime, the injunction granted on the 23rd May will remain in full force and effect.

I make no disposition of the costs of this application at the present time, leaving that to the judge presiding in the non-jury sittings, who will finally deal with the matter.

20th June 1946. The motion was renewed before McRuer C.J.H.C. at the non-jury sittings at Toronto.

The same counsel appeared.

24th June 1946. McRuer C.J.H.C.:—The plaintiff moves to continue an interim injunction granted by the Honourable Mr. Justice Wells on the 23rd May 1946. On the argument before me, counsel for the plaintiff asks for an order:

“1. Continuing until the trial or other final disposition of this action the injunction granted by The Honourable Mr. Justice Wells herein on the 23rd day of May, 1946, whereby the defendants were restrained:

“(a) from acting or purporting to act in any way as directors or officers of Yellowknife Gold Mines Limited, and

“(b) from issuing or allotting any shares of the said Yellowknife Gold Mines Limited which were not actually issued and allotted at the time of the opening of the annual general meeting of the shareholders of Yellowknife Gold Mines Limited on the 17th of May, 1946, and

“2. Restraining the defendant, H. R. Swanson, or any other person acting as Chairman of any meeting of the shareholders of Yellowknife Gold Mines Limited, including the continuation of

the said Annual General Meeting, held prior to the next valid election of directors of the said Company or prior to the final disposition of this action, whichever event first occurs, from accepting or counting votes polled in respect of shares of the said Company, if any, issued since the opening of the said meeting of the said Company on the 17th day of May aforesaid, and

"3. Requiring the defendant, H. R. Swanson, and the defendant, C. A. Gardner, as Chairman and Secretary, respectively, of the said meeting or such other person or persons as the Court may appoint, to forthwith reconvene the said meeting at such place and at such time and on such notice as the Court may direct, or in the alternative, for such further or other order as to the reconvening of the said meeting as the Court shall deem necessary or proper, and

"4. Appointing a shareholder other than the said defendant, H. R. Swanson to act as Chairman of the said meeting when the same has been reconvened, and

"5. Such further and other order as to the said Court shall seem meet."

The Honourable Mr. Justice Wells has outlined in his reasons for judgment a sufficient statement of the matters that give rise to this application, and for the purposes of this motion the matter may be dealt with on a narrow basis.

It was not argued before me on behalf of the defendants that the defendants are *de jure* directors of the company. In fact, counsel frankly admitted that he could not argue that they were anything more than *de facto* directors. There would appear to be no doubt that until the special meeting called on the 17th May 1946, no by-law, properly ratified by the shareholders, was in existence making provision for more than three directors, and that the election of the defendants prior to that date to constitute a board of five directors is invalid.

On the 17th May, immediately following the special general meeting of the shareholders of the company which ratified the by-law increasing the number of directors from three to five, a general meeting of the shareholders was held. The course of this meeting is referred to by the Honourable Mr. Justice Wells, and it is not necessary for me on this application to enlarge further on what has been said except to say that instead of proceeding validly to constitute a board of directors, which all par-

ties apparently realized was necessary, a resolution to adjourn the meeting until the 12th September was carried, against the wishes of a very large number of shareholders, by a majority vote, and on a questionable counting of proxies. This plaintiff, now suing on behalf of himself and all other shareholders, asks that the Court restrain the defendants from usurping the functions of directors until a shareholders' meeting is called and a board of directors is properly elected by the vote of the shareholders. In the allegations contained in the material filed, it is contended that the defendants are only nominal shareholders of Yellowknife Gold Mines Limited, and that they not only unlawfully occupy the office of directors, but that they have used, and it is feared they will continue to use, that office against the interests of the company and in favour of Bear Exploration and Radium Limited, of which they are also directors, as well as large shareholders. It is not necessary for me to pass with any finality on these allegations. The material, however, is sufficient to convince me that the defendants should be restrained from acting, or purporting to act, as directors or officers of Yellowknife Gold Mines Limited until the trial or other final disposition of this action, or until they are regularly elected directors of the company. I think, however, that the defendants, having assumed to act as *de facto* directors of the company, have not only the power but the duty to reconvene the annual meeting of shareholders at once, or to call a special general meeting for the purpose of properly constituting the board. See *Re Owen Sound Lumber Co.* (1915), 34 O.L.R. 528, 25 D.L.R. 812, affirmed on this point (1917), 38 O.L.R. 414, 33 D.L.R. 487, where the duty of *de facto* directors was discussed, and it was held that *de facto* directors, having assumed office, stood in a fiduciary relationship to the company and were liable for breach of that relationship. I am of the opinion that the principles of this case apply where *de facto* directors have knowledge that there is no properly constituted board of directors to carry on the affairs of the company, and that, having assumed to act as directors, they have an obligation to convene a meeting of shareholders for the purpose of having a board of directors properly elected.

The other relief asked for on this motion presents a more difficult problem. I am of the opinion that the relief asked for

in para. 2 of the notice of motion cannot be granted in the action as framed. This would involve a restraint on the corporate activities of Yellowknife Gold Mines Limited, which company is not a party to this action.

Counsel for the applicant presented an able argument in support of the relief asked for in para. 3 of the notice of motion. In support of his argument he relied on *Bainbridge v. Smith* (1889), 41 Ch. D. 462; *Pender v. Lushington* (1877), 6 Ch. D. 70, and *Leavens v. Great West Permanent Loan Company et al.*, 36 Man. R. 606, [1927] 2 W.W.R. 606. I am however of the opinion that whatever may be said as to the power of the Court to direct a shareholders' meeting in proper cases, I have not the power to make an order in this action as constituted. The corporation not being before the Court, there are no parties to this action, as framed, that the Court has power to order to act in a corporate capacity in respect of the affairs of Yellowknife Gold Mines Limited.

Nor do I feel that I can make a mandatory order directed to these defendants. No action has been taken by the shareholders under the provisions of s. 47 of The Companies Act, R.S.O. 1937, c. 251. In so far as it may be necessary for me to decide for the purpose of the disposition of this case, I am of the opinion that if a requisition under s. 47 of the Act were lodged with the *de facto* directors, the provisions of the section would apply, and, applying the principles that I deduce from *Re Owen Sound Lumber Co.*, *supra*, the defendants would be obliged to take action to protect the interests of the company, and if they failed to do so, the further provisions of the section would apply, so that a properly constituted meeting of shareholders might be held. The Companies Act, therefore, providing the shareholders with a means of relief, the special power of the Court to grant a mandatory order ought not to be exercised.

Without considering what power I may have to make the order asked for in para. 4 of this notice of motion, were this action otherwise framed, I am of the opinion that in the present circumstances I have no power to make such an order.

I have therefore come to the conclusion that the proper disposition of this motion is to order that the defendants be restrained until the trial or other disposition of this action, or until they may be properly elected as directors at a general meet-

ing of shareholders of Yellowknife Gold Mines Limited, from acting or purporting to act in any way as directors or officers of Yellowknife Gold Mines Limited, except to call a general meeting of shareholders or to reconvene the general meeting convened on the 17th May 1946, and adjourned until the 12th September 1946. In so far as the order of Mr. Justice Wells granting the injunction herein may extend beyond the provisions of this order it is dissolved.

The costs of this application will be costs in the cause.

Order accordingly.

Solicitors for the plaintiff: Mason, Foulds, Davidson & Gale, Toronto.

Solicitors for the defendants: Mercer & Bradford, Toronto.

[LEBEL J.]

Crone v. Crone and Kay.

Divorce—Evidence—Sufficiency—Evidence of Non-access—The Evidence Act, R.S.O. 1937, c. 119, s. 5a, as enacted by 1946 (Ont.), c. 25, s. 1.

In an action for divorce, it was proved that a child had been born to the defendant wife in May 1945, and both spouses gave evidence (as permitted by s. 5a of The Evidence Act, as enacted in 1946) that there had been no sexual intercourse between them after September 1942. There was independent evidence making it unlikely (but not impossible) that intercourse had taken place after August 1944. The wife, called as a witness by the plaintiff, swore that her co-defendant was the father of the child, but the judge refused to accept her evidence as worthy of credit.

Held, in these circumstances, a divorce could not be granted. The Court was left, after rejecting the wife's evidence, with only the unsupported evidence of the husband that there had been no intercourse after 1942, and this was not sufficient for a judgment which would result in the illegitimation of the child. Further, the child was registered, under The Vital Statistics Act, as legitimate, and the evidence was not sufficient to displace the presumption of legitimacy arising under s. 6(3) of that Act.

AN ACTION by a husband for divorce.

15th May 1946. The action was tried by LEBEL J. without a jury at Toronto.

R. P. Locke, K.C., for the plaintiff.

Nathan Phillips, K.C., for the defendant Kay.

No one for the defendant wife.

6th July 1946. LEBEL J.:—This is an action by a husband for divorce. The parties were married at Ancaster in June 1942,

at which time the plaintiff was a member of the Royal Canadian Air Force. In August 1944, after training at various centres, he was posted to Coastal Bomber Command and stationed at Halifax. From there he made flights back and forth across the Atlantic. On 26th May 1945 a female child was born to the wife. Both spouses denied access to each other since September 1942, and claimed that Kay, the co-respondent, was the father of the child, notwithstanding the fact that a birth certificate issued pursuant to The Vital Statistics Act, R.S.O. 1937, c. 88, s. 6, filed as part of the plaintiff's case, and based upon information supplied by the wife herself, showed the spouses to be the parents.

Little need be said about the facts stated by the wife in evidence, going to establish that Kay was the father of her child as the result of an adulterous intercourse, except that I wholly reject them, and do so without hesitation. The wife testified on behalf of the plaintiff after furnishing him with the name of the co-respondent, in response to a letter she received from his solicitor. She swore that she had become pregnant as a result of misconduct with Kay on one isolated occasion, but her actions following conception were not those of a woman who finds herself in such a predicament, and I had the opportunity of hearing and observing Kay in the witness-box. I accepted his denial without reservation, and at the end of the trial I dismissed the action against him.

By Act of the Legislature, 1946 (Ont.), c. 25, assented to on 27th March 1946, as appears from the issue of the Ontario Gazette of 20th April 1946, p. 656, a new section was added to The Evidence Act, R.S.O. 1937, c. 119, as s. 5a. It reads:

" . . . a husband or a wife may in any action, give evidence that he or she did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage."

The new section was designed to mitigate the hardship caused in certain cases by the application of the rule in *Russell v. Russell*, [1924] A.C. 687, which has been consistently applied by our courts. That rule is that neither the husband nor the wife is permitted, in an action instituted in consequence of adultery, to give evidence of non-access after marriage which tends to bastardize a child born in lawful wedlock, it being necessary

to prove non-access by evidence other than that of the husband or wife.

I intimated to counsel for the plaintiff, when I dismissed the action against the co-respondent, that I could place no faith whatever in the wife's testimony, but he urged that I could and should, nevertheless, grant a decree *nisi* solely upon the plaintiff's evidence of non-access. He argued that corroboration was unnecessary, and referred me to the recent case in our Courts of *Darnell v. Darnell et al.*, [1945] O.R. 743, [1945] 4 D.L.R. 780, as authority for his contention. But in the case referred to the learned trial judge did not find that he was unable to accept an admission of adultery made by one of the spouses. He based his judgment on the necessity for corroboration as a rule of law, and he was overruled for this reason upon the authority, principally, of *Robinson v. Robinson and Lane* (1858), 1 Sw. & Tr. 362 at 393, 164 E.R. 767. Furthermore, the *Darnell* case is authority for the proposition that the Court must act with the utmost caution and vigilance in cases where a divorce is sought upon an admission of adultery. The words of Cockburn C.J. in the *Robinson* case are:

"No doubt the admissions of a wife unsupported by corroborative proof should be received with the utmost circumspection and caution; not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though unsupported, they could effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of this kind".

Since the Court, as part of its duty, must exercise the utmost circumspection and caution in receiving evidence of such character, its duty in the matter of vigilance can be of no lesser degree, in my view, where the illegitimation of a child may be a consequence of the acceptance of evidence of non-access, and this is so now when, fortunately, society's views upon the question of illegitimacy are less harsh, and, happily, more merciful than they were in years past in so far as the child is concerned.

It will have been observed that the opportunity for access in this case did not come to an end until August 1944, if it did in fact end at that time, since the plaintiff was afterward flying back and forth to Canada. An attempt was made to furnish

some corroboration of non-access in the evidence of the plaintiff's sister, but she clearly did not know anything about the plaintiff's actual movements after August 1944. It will also be observed that the child was born to the wife within the normal period of gestation even if there was no access from and after August 1944, and therefore, in the result, that the plaintiff's case rests solely upon the spouses' evidence of non-access after September 1942. As stated, I did not accept the wife as a person worthy of credit, so that if I were to grant a decree *nisi* I would have to accede to the submission of counsel for the plaintiff and grant it solely on the strength of the plaintiff's evidence.

In the *Darnell* case, Laidlaw J.A., at p. 747, is reported to have said:

" . . . it was within the discretion of the trial judge to say that the unsupported evidence of the defendant husband was not trustworthy, and this Court would refrain from substituting the judgment of its members in place of one in a position of much advantage in weighing the evidence."

Where, as here, both spouses openly display their eagerness to secure a divorce; where the husband has never seen the child, as far as the evidence goes; where the husband undertook to prove that the co-respondent was the father of the child and failed to do so, and where there was no good reason shown why the plaintiff's evidence should be accepted, I could not bring myself to find that the husband's unsupported evidence is trustworthy and that the child is illegitimate. Furthermore, the evidence in the case is not sufficient, in my opinion, to displace the presumption of legitimacy raised by the birth certificate under s. 6(3) of The Vital Statistics Act.

The action is therefore dismissed. The co-respondent is entitled to his costs from the plaintiff.

Action dismissed.

Solicitors for the plaintiff: Locke & Powell, Toronto.

Solicitors for the defendant Kay: Nathan Phillips & Phillips, Toronto.

[LEBEL J.]

Ferguson v. Lastewka et al.

Fraudulent Conveyances—Setting Aside—Valuable and Adequate Consideration—Necessity for Proving Actual Intent to Defraud by both Vendor and Purchaser—The Fraudulent Conveyances Act, R.S.O. 1937, c. 149.

Where it is sought to set aside a conveyance as fraudulent and void against creditors, and it is established that the conveyance was given for valuable and adequate consideration, the plaintiff, to succeed, must show an actual and express intent to defraud on the grantor's part, and that the grantee was privy to such intent. The question of intent to defraud is one of fact, which the Court must decide on the evidence in each particular case, after taking into consideration all the circumstances surrounding the making of the conveyance. Mere suspicious circumstances are not sufficient to establish actual fraud.

Where it is shown that the grantee, as well as the grantor, knows that an action for damages is pending against the grantor, and there is sufficient evidence to justify an inference that both parties entered into the transaction for the purpose of defeating the expected execution in that action, the conveyance is void and may be set aside at the instance of the judgment creditor. In determining this question the Court may consider, with other circumstances, a close relationship between the parties, and the fact that there has been no immediate or early change of possession after the conveyance in question. Review of authorities.

AN ACTION to set aside a conveyance as fraudulent. The facts are fully stated in the reasons for judgment.

8th and 9th April 1946. The action was tried by LEBEL J. without a jury at St. Catharines.

E. H. Lancaster, K.C., for the plaintiff.

William Schreiber, for the defendants Andrew Ewaschuk and Milly Ewaschuk.

No one for the defendant Lastewka.

9th July 1946. LEBEL J.:—The plaintiff is an execution creditor of the defendant Michael Lastewka for \$12,075 and costs. She seeks to set aside, as fraudulent and void against her and other creditors, a conveyance dated 3rd July 1944, made by the said defendant to his daughter and her husband, the other defendants. The plaintiff's judgment, on which execution remained wholly unsatisfied at the time of the trial, was recovered in an action instituted on 21st November 1944, for damages sustained in a motor car accident as a result of which the plaintiff was seriously injured and her husband was killed. The motor accident occurred on 3rd April 1944.

The circumstances under which the defendant Lastewka acquired the lands described in the impeached conveyance, and later conveyed them to his co-defendants, are these:

In the early summer of 1943, all the defendants resided in Montreal. With a view to purchasing a farm in the Niagara district, Lastewka sold his home in Montreal. He was then indebted to the defendant Andrew Ewaschuk in the sum of \$1,500, but he arranged with Ewaschuk that the latter should accept his promissory note for the amount of the debt, without interest, maturing 1st July 1944. On 14th August 1943, Lastewka purchased fifteen acres in Lincoln County, being part of a fruit farm owned by one James A. Johnson. He paid \$2,000 in cash and gave Mr. Johnson a mortgage for \$2,200, the balance of the purchase price. In erecting a house and barn on the property, and in commencing his farm operations, he said, he used up all his available cash. In November 1943 he borrowed \$500 from a bank, and he swore that he secured loans from a sister amounting in all to \$300, and incurred other debts. On 3rd July 1944, the date of the disputed conveyance, besides the mortgage indebtedness and the Ewaschuk note, he said on his examination for discovery, which was read in as part of the plaintiff's case, he owed in the neighbourhood of \$1,350 to the bank and the others. Soon after Lastewka's purchase of the fruit farm the Ewaschuks visited him there and they became interested in acquiring property in the vicinity for themselves. That such might be their decision was suggested in a letter the defendant Milly Ewaschuk wrote to her mother as early as 1st August 1943. In another letter, dated 8th February 1944, Milly Ewaschuk told her mother that she and her husband had a prospective buyer for their Montreal house, and that they were interested in the farm adjoining the Lastewkas', *i.e.*, Mr. Johnson's. She also said they would like to obtain payment of the promissory note, or at least \$1,000 on account. The Ewaschuks completed the sale of their Montreal house, Milly Ewaschuk swore, a few days before they heard of the motor car accident. On 1st and 2nd May 1944 their furniture was moved from Montreal to the Lastewka farm. The Ewaschuks followed in the same month. Andrew Ewaschuk interviewed Mr. Johnson with a view to buying his farm, but the price was apparently too high. Ewaschuk also looked at some other farms in the vicinity before returning to Montreal to secure a National Selective Service

release from his employment in a war plant there. He testified that up to the time that he returned to Montreal for this purpose he had no intention of purchasing his father-in-law's farm. After securing the release mentioned, Ewaschuk returned to the Lastewkas' farm, but in the meantime, on 21st June 1944, Lastewka had been convicted of an offence related to the operation of his motor vehicle involved in the accident, and he was now serving a three months' sentence in the Ontario Reformatory at Guelph. Ewaschuk swore that his mother-in-law then informed him that her husband had decided to sell the farm and would give him the first chance to buy. On his examination for discovery (Q. 166, also read in as part of the plaintiff's case) Ewaschuk swore that his mother-in-law had said that the price was \$5,400. Ewaschuk then sought the advice of Thomas R. BeGora, a solicitor of this court in St. Catharines, and a few days later instructed him to draw a deed from Lastewka to himself and his wife as joint tenants, in consideration of the amount mentioned. Mr. BeGora prepared the deed but did not fill out the land transfer tax affidavit because he did not know all necessary details. The deed as drawn, however, included a covenant for the assumption of the Johnson mortgage. On 3rd July 1944, Mr. BeGora, Andrew Ewaschuk, and a man named Baraniuk, drove to Guelph and interviewed Lastewka in the reformatory. Lastewka testified that at this interview he told Ewaschuk that if he paid him \$2,000, the equivalent of the amount he himself had paid down on the purchase of the farm, assumed the balance owing on the Johnson mortgage, *viz.*, \$1,900, and returned his promissory note for \$1,500, he could have the farm. These amounts total the consideration said to have been mentioned by Mrs. Lastewka. Mr. BeGora then filled in the land transfer tax affidavit and Lastewka executed the deed and handed it back to Mr. BeGora. The document was signed later by the Ewaschuks and by Mrs. Lastewka. Ewaschuk returned the promissory note to Mrs. Lastewka, and, as directed by her husband, gave her his cheque for \$2,000 some days later. Out of the proceeds of this cheque, it was said, the bank and all Lastewka's existing creditors were paid off, and Lastewka's wife swore that she afterwards deposited the balance in her own bank account.

The plaintiff alleges that the impeached conveyance was executed and delivered in pursuance of a fraudulent scheme "for

the purpose of defeating, defrauding and delaying the Plaintiff and other creditors", and Mr. Lancaster argued that the Court should find that the consideration set up by the defendants in support of the transaction was illusory and inadequate, and in any event that there was an intention on the part of the defendants to defraud the plaintiff and Lastewka's other creditors. Mr. Schreiber contended that the sale to the Ewaschuks was for valuable consideration, and argued that these defendants were as much entitled to take advantage of Lastewka's financial embarrassment, and the predicament he found himself in, as a result of the accident, as a stranger would be entitled to do; in effect, that the purchase of the farm by the Ewaschuks was for valuable consideration and was *bona fide*.

I am unable to accede to the plaintiff's contention that the consideration paid by the Ewaschuks was illusory or inadequate. I find as a fact that Lastewka owed Andrew Ewaschuk the sum of \$1,500, that Ewaschuk assumed the balance owing on the Johnson mortgage, and that he paid Mrs. Lastewka on her husband's instructions the balance of the purchase price, *viz.*, \$2,000. As a result, I find that the impeached conveyance was given for valuable and adequate consideration, and I conclude, as counsel for the plaintiff conceded at the close of his argument, that to succeed the plaintiff must establish an actual and express intent to defraud creditors on the part of Lastewka, and that the Ewaschuks were privy to such intent: see *Hickerson v. Parrington* (1891), 18 O.A.R. 635 at 640-41; May on *Fraudulent Conveyances*, 3rd ed. 1908, p. 62; and *Cadogan et al. v. Kennett et al.* (1776), 2 Cowp. 432, 98 E.R. 1171.

It is stated by Sir G. J. Turner V.C. in *Harman v. Richards* (1852), 10 Hare 81 at p. 89, 68 E.R. 847, that " . . . those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration have, I think, a task of great difficulty to discharge"; but it has been said that a fraudulent intention to which the purchaser is a party will override all inquiry into the consideration: see May, *op. cit.*, p. 63, and the cases cited in footnote (t); see also *McMullen v. Dr. Barnardo's Homes National Incorporated Association* (1924), 26 O.W.N. 168.

The question of intent to defraud creditors is one of fact which the Court has to decide on the merits of each particular

case, after taking into account all the circumstances surrounding the making of the conveyance: see *Hawley v. Hand* (1921), 50 O.L.R. 444, 64 D.L.R. 504; 15 Halsbury, 2nd ed. 1934, p. 250; *Ex parte Mercer*; *In re Wise* (1886), 17 Q.B.D. 290; *May op. cit.*, p. 70; and *Hale v. The Metropolitan Saloon Omnibus Company* (1859), 28 L.J. Ch. 777. Mere suspicious circumstances are not sufficient to establish actual fraud: see *Hickerson v. Parrington*, *supra*, at p. 643, and *Shephard v. Shephard*, 56 O.L.R. 555, [1925] 2 D.L.R. 897.

The circumstances so far related show that it was within the knowledge of all the defendants that while the damage action was not commenced for some seven months following the date of the impeached conveyance—due to the nature of the plaintiff's injuries and her long hospitalization—the accident occurred four months earlier; also, that just prior to the date of the disputed instrument, Lastewka was convicted of an offence in connection with the accident, and was in custody as a result.

The plaintiff's counsel relied upon these factors, as well as on others to be mentioned, as proof of actual fraud, and urged that the conveyance was delivered *pendente lite*, in effect, if not in fact, as a mere scheme or trick to defeat creditors and the plaintiff in particular.

In *Cadogan et al. v. Kennett et al.*, *supra*, Lord Mansfield C.J. said: "So, if a man knows of a judgment and execution, and, with a view to defeat it, purchases the debtor's goods, it is void: because, the purpose is iniquitous. It is assisting one man to cheat another, which the law will never allow."

I am satisfied that the principle enunciated by Lord Mansfield is equally applicable in cases where a creditor has not recovered judgment at the date of the impeached conveyance, but the purchaser, knowing of the creditor's pending or likely action, purchases the debtor's property with a view to defeating the expected execution: see *Gurofski v. Harris et al.* (1896), 27 O.R. 201, affirmed 23 O.A.R. 717; *Hopkinson v. Westerman* (1919), 45 O.L.R. 208, 48 D.L.R. 597; *May, op. cit.*, p. 102; *McMullen v. Dr. Barnardo's Homes National Incorporated Association*, *supra*; *Goyan v. Kinash and Kinash*, [1945] 1 W.W.R. 291, [1945] 2 D.L.R. 749; *Barling v. Bishopp* (1860), 29 Beav. 417, 54 E.R. 689, and *Edmunds v. Edmunds*, [1904] P. 362.

A careful consideration of the evidence and the exhibits, in the light of the principles mentioned, has satisfied me that Lastewka conveyed his farm intending to defraud his creditors, and the plaintiff in particular, and that Andrew Ewaschuk and Milly Ewaschuk, on a lesser scale, were parties to the fraud. I am satisfied that the plaintiff has discharged the onus upon her in this regard.

While it is a fact that the Ewaschuks decided to sell their Montreal home and purchase a fruit farm in the Niagara district, in the vicinity of the Lastewka place, and that they actually sold the house to implement this intention, before hearing of the accident, it is equally clear, from Andrew Ewaschuk's admission, that they had no intention of purchasing the Lastewka farm until after Ewaschuk returned from Montreal, late in June 1944, by which time Lastewka had been convicted and was in the reformatory. The conviction and sentence must have made a deep impression upon the Ewaschuks, because there was the matter of the promissory note, now almost due, and Andrew Ewaschuk admitted in cross-examination that he knew Lastewka was then "flat broke". I am satisfied that as a result of the police court proceedings Andrew Ewaschuk realized the likelihood of an action for damages succeeding against Lastewka. I do not accept his statement that he did not know that such an action lay. The outlook for Lastewka, and as well for himself, must have looked black indeed, so he consulted Mr. BeGora. The latter thought that he was first shown the writ of summons in the plaintiff's damage action before there was any discussion with respect to the transfer of the farm, but he was undoubtedly mistaken, because the writ in that action was not issued for many months following the date of the impeached conveyance. Mr. BeGora swore that he advised Ewaschuk, before he drew the deed to him and his wife, that to uphold a sale it would be necessary to establish a *bona fide* sale. At that time Lastewka was in the reformatory, he said, and his two attendances upon Ewaschuk were only a few days apart. Andrew Ewaschuk himself set at rest any doubt that might exist as to the time of his first discussion with Mr. BeGora. On cross-examination he said that Mr. BeGora had told him that if a civil suit were brought there would have to be proof that he had bought the farm from Lastewka, and he said that he had replied, "I am buying it." This makes it perfectly clear that the prospective

damage action was very much in Ewaschuk's mind at the time he first consulted Mr. BeGora. As another indication of what was in his mind, Mr. Graves, Sheriff of the County of Lincoln, testified that when he served the writ in the present action, Ewaschuk told him that he and his wife had bought the farm in March 1944, that is, before the date of the accident, which was, of course, untrue.

And why was Ewaschuk in such a hurry to complete the transaction on 3rd July, when Lastewka was in the reformatory? Mr. BeGora was not even asked to search the title to the property. No creditor was pressing. Why also was Lastewka in such haste to sell, when one considers that he had not yet owned the property a year, had erected buildings on it, and, so far as the evidence goes, had still to take in his first dollar from his crop? I do not accept the explanation that Lastewka was worried about the crop because of his incarceration. The Ewaschuks were then on the farm and could have done any work required during the period of his three months' sentence.

Mere knowledge of an intended action, and unusual haste on the part of the defendants, viewed as a desire on Lastewka's part to give, and a desire on Ewaschuk's part to secure, a preference over the plaintiff and/or other creditors, may not be sufficient to justify me in concluding that the defendants intended to defeat, hinder, delay or defraud creditors. The statute 13 Eliz., c. 5 and The Fraudulent Conveyances Act, R.S.O. 1937, c. 149, which is the same in substance, have no regard whatever to the question of preference or priority among creditors. It is unnecessary, also, on the facts of this case, and in view of the pleadings, to consider what effect, if any, The Assignments and Preferences Act, R.S.O. 1937, c. 179, has upon the transaction. But the two factors mentioned may be considered in looking at all the circumstances upon the question of intent, and there are other badges of fraud readily discernible in the evidence.

Baraniuk, to whom I have referred, and who was called by the defendants, testified that when Lastewka and Ewaschuk were talking together at the reformatory, the former said in reply to some explanation made by the latter: "If it is that way, I'll have to sell it." Baraniuk afterwards said Lastewka's reply was in answer to a demand made by Ewaschuk for payment of his note, but I was convinced that this explanation was an after-thought. It was made hesitatingly and in an unsatisfactory

manner, and I do not accept it. I am satisfied on the evidence that Lastewka had no thought of selling his farm until Ewaschuk pointed out to him the likelihood of a forthcoming damage action, and that the real explanation Ewaschuk gave him was to the effect that a transfer would have to be made for consideration if the property was to be saved. It was that, in my opinion, that brought forth the reply from Lastewka that Baraniuk overheard.

And why did Lastewka direct Ewaschuk to give the cheque for \$2,000 to Mrs. Lastewka? The latter said she cashed it, and that she and her husband, after his release from the reformatory, paid all his creditors, and that she then deposited the balance in her own bank account. Nothing was produced to corroborate the existence of the alleged creditors except Lastewka's cancelled bank promissory note, and I doubt very much whether Lastewka owed the amount he professed to owe. In any event, why was Lastewka's wife entrusted with the only money involved in the transaction, unless it was part of a scheme to defeat such creditors as were then in existence or in prospect?

Lastewka's conduct prior to the trial of the plaintiff's damage action, viewed with the other circumstances, is also significant upon the question of his intention at the time of the transaction. Despite Mr. BeGora's offer to act in his defence at the trial for nothing, Lastewka told him that he had no money and added: "They can't get anything from me anyway."

Perhaps most important of all was the fact that there was no immediate or early change of possession following delivery of the conveyance. After serving his three months' sentence, Lastewka returned to the farm and continued to live there, with his wife and the Ewaschuks, for many months. It was said that there was no place else to go, but that, in my opinion, also militates against the *bona fides* of the sale. It will be remembered that the Ewaschuks moved their furniture to the farm and came to reside with the Lastewkas, even though they had not yet purchased a place for themselves. After the alleged sale there was no change in this arrangement. Joint possession raises a presumption of fraud: see 15 Halsbury, p. 253. Very significant on this point, too, was the evidence of Mr. Preston, a real estate agent, who visited the farm as late as November 1944 to ascertain if the property was for sale. Mr. Preston

swore that Lastewka, who was then working on the farm, told him that he was the owner of the farm and that it was not for sale. I prefer his evidence to the denials of this incident made by Lastewka and Milly Ewaschuk.

Mr. Schreiber argued that an intention to defeat an expected execution by a particular judgment creditor does not necessarily constitute a fraud, and he relied upon the decision in *Wood v. Dixie* (1845), 7 Q.B. 892, 115 E.R. 724, but it is stated in 15 Halsbury, at p. 251: “. . . to be valid an alienation made with such intent must be for full value and, as between the debtor and the grantee, a *bona fide* transaction.” The cases cited in the footnote, (e), amply bear out this proposition. See also *Edmunds v. Edmunds*, *supra*, and *McKinnon v. Gillard*; *Gillard v. McKinnon*; *Gillard v. Cuthbert* (1907), 9 O.W.R. 77 at 84. In any event, I find that at the time of the impeached conveyance there was at least one other creditor, namely the bank, and perhaps others, and the fact that Lastewka afterwards purged the fraud, in so far as the bank and others are concerned, is immaterial.

Mr. Schreiber also argued that the Court should not consider the relationship between the parties where valuable consideration is proved, and I agree with him, generally speaking, but the case at bar is, in my opinion, very different on the facts from the case of a stranger who buys property with knowledge of other existing and prospective creditors. In the present case it is, in my opinion, permissible to consider the question of relationship in the light of all the other circumstances of the case. Mr. Schreiber relied strongly upon the decision in *Gurofski v. Harris et al.*, *supra*, but in that case the facts were very different. There was there no finding that the purchaser was aware of the vendor's fraudulent intent, and the pending action for damages was said in that case to be frivolous (*per* MacMahon J. at p. 207). There was furthermore no finding impeaching the credibility of witnesses. As may be gathered from what I have already said, I think I can place no reliance here upon the alleged honest intentions of the defendants. I do not accept their protestations of honesty, and my conclusions are based upon that fact as much as, if not more than, any other. The circumstances of this case, and the demeanour of the defendants in the witness-box, are consistent in my view

with but one conclusion, namely, that the transaction between the defendants was part of a scheme to retain a benefit for Lastewka, and was not a *bona fide* sale.

I should not conclude my reasons without adding that I am satisfied that Mr. BeGora was in no way privy to the fraud of the defendants. The advice he gave Ewaschuk was sound, and he was not present during the conversation between Lastewka and Ewaschuk which preceded execution of the conveyance by the former, and which Baraniuk overheard in part at least. The whole incident, however, is illustrative of the fact that solicitors, in circumstances suggestive of possible fraud, must be extremely watchful of their own position in the matter. It should be mentioned, too, that the solicitor for the Ewaschuks waived any question of privilege in so far as Mr. BeGora's evidence was concerned, and none was claimed by Lastewka.

The plaintiff's action succeeds and there will be judgment declaring that the conveyance from the defendant Michael Lastewka to his co-defendants (20535 for the Township of Grantham) is null and void against the plaintiff and other creditors of Michael Lastewka. The plaintiff is entitled to her costs.

Judgment for plaintiff with costs.

Solicitors for the plaintiff: Lancaster, Mix and Sullivan, St. Catharines.

Solicitor for the defendants Andrew and Milly Ewaschuk: William Schreiber, Hamilton.

[COURT OF APPEAL.]

McInroy v. McInroy.

Divorce and Matrimonial Causes—Alimony—Grounds—Legal Cruelty—Neglect and Unfaithfulness of Husband, Persisted in after Knowledge that Wife's Health being Undermined by Worry.

A husband and wife, married in 1920, lived happily together until the end of 1938 or the beginning of 1939, when the husband began to absent himself from home with increasing frequency, without telling his wife where he had been. The wife worried greatly about the situation, to the extent that her health was impaired, and this condition was much aggravated when she discovered, in 1941, that the husband was spending these times with another woman, to whose apartment he had a key. The husband, although he promised to give up his association with the other woman, did not do so, and persisted in his course of conduct until 1944, when the wife left him, on the advice of a physician whom she consulted. The husband had been aware of the effect on his wife's health. The medical evidence was that there was a progressive deterioration in her condition, at least from 1941 on, brought about by worry, and that it was imperative that she should leave home, if a complete breakdown was to be avoided. The trial judge found as a fact that the evidence had not established either adultery or physical violence on the part of the husband.

Held (LAIDLAW J.A. dissenting), the wife, in these circumstances, was entitled to alimony, since the facts of the case brought it within the principle of such decisions as *Lovell v. Lovell* (1906), 13 O.L.R. 569, and *Burns v. Burns and Fredericks*, [1944] O.R. 561. The husband's placing of another woman before his wife, his secretiveness, the time and place of his meetings with her, all suggesting something illicit, and his long continuance in this course of conduct, wholly in disregard of his wife's protests and of the serious consequences to her health, constituted legal cruelty.

AN APPEAL by the defendant from the judgment of Chevrier J., sitting without a jury, in favour of the plaintiff in an action for alimony.

5th June 1945. The appeal was heard by ROBERTSON C.J.O. and GILLANDERS and LAIDLAW JJ.A.

J. R. Cartwright, K.C., for the defendant, appellant: The action should have been dismissed at the trial. The trial judge has found that there was trouble between the parties, caused by the presence of the plaintiff's mother-in-law in the home, but that this alone would not have justified the plaintiff in leaving. He also found that there was an association (not amounting to adultery) with Mrs. Graae. There is no evidence that the defendant ever brought Mrs. Graae to his home, or "paraded" his association with her before his family. This association, with other matters, weighed on the plaintiff's mind until she was in danger of a breakdown.

These facts do not furnish a basis for an award of alimony. The case is wholly distinguishable from *Burns v. Burns and*

Fredericks, [1944] O.R. 561, [1944] 4 D.L.R. 513. [ROBERTSON C.J.O.: Is it not important to consider the age of the parties, and the kind of people they were? It might be that to this woman of 55 the husband's secretiveness would be worse than the open taunting in the *Burns* case.] The husband's misconduct, resulting in impairment of the wife's health, must be something that is wrong, in the sense that the law will take cognizance of it. The law does not prohibit married people falling in love with others, provided there is no guilty intimacy.

Here there were two other factors which contributed to the plaintiff's unhappiness, the presence of her mother-in-law, and the parties' inability to agree upon the terms of a separation agreement. [LAIDLAW J.A.: I suppose there must be a distinction between association with another woman, standing alone, and the effect of that association upon the husband's conduct towards his wife?] Yes, and the trial judge expressly finds that the "spectre" of the association, alone, is enough, when coupled with its effect upon the plaintiff's health. He says that the defendant's mere conduct in forming this association and neglecting the plaintiff constitutes legal cruelty.

Neither of the other factors could amount to legal cruelty, nor could they do so taken in combination. It is impossible to say how far they contributed to the impairment of the plaintiff's health. She says herself that she could not go back to the farm if her mother-in-law was still there, even if the defendant gave up Mrs. Graae. This is the best evidence of the plaintiff's own view as to what was causing, or contributing to, her state of health.

To hold that the husband's conduct here amounted to legal cruelty would open the gates to a flood of alimony actions. It is not legal cruelty within the decided cases. In this connection, I refer to *Lovell v. Lovell* (1906), 13 O.L.R. 569; *Bagshaw v. Bagshaw* (1920), 48 O.L.R. 52, 54 D.L.R. 634; *Whimbey v. Whimbey* (1919), 45 O.L.R. 228, 48 D.L.R. 190; *Russell v. Russell*, [1895] P. 315, affirmed [1897] A.C. 395; *Evans v. Evans* (1790), 1 Hag. Con. 35 at 56, 161 E.R. 466; *Paterson v. Paterson* (1850), 3 H.L. Cas. 308 at 333, 10 E.R. 120; *Cousen v. Cousen* (1864), 4 Sw. & Tr. 164, 164 E.R. 1479.

Even if the husband is liable to pay alimony, the amount awarded by the trial judge is excessive, and not supported by the evidence. He gives no indication of the basis of his com-

putation, or his reasons for arriving at an amount of \$100 per month.

G. W. Mason, K.C., for the plaintiff, respondent: Upon reading the evidence, it is clear that neither the presence of the mother-in-law nor the disagreement about a separation was a serious cause of worry. The real difficulty arose in 1938 or 1939, after the defendant had begun to pay attention to Mrs. Graae. He himself, in his evidence, shows that he recognized the enormity of his conduct. A reading of the evidence leads to the inevitable conclusion that the plaintiff was suffering severely, not only because of what she heard, but because of the conversations she had with the defendant.

No offer was made by the defendant to take his wife back until the trial, and what he said there was an entirely empty offer, without any intention on his part to mend his ways.

Cruelty may be even more insidious and dangerous where there is no physical violence. [LAIDLAW J.A.: Suppose a wife discovers that her husband is having a guilty association with another woman, and says nothing at all about it to him, but worries secretly until her health is endangered, would she be entitled to alimony?] I submit so—his mere continuing with the other association is conduct towards his wife, and if it causes danger to her health it is ground for awarding alimony. Here, of course, there is much more than that. [ROBERTSON C.J.O.: Does the evidence bear out the suggestion that the defendant continued this conduct after knowing the effect it was having on the plaintiff's health?] I submit it does.

As to the quantum of alimony: The defendant was not frank in his evidence. No harm can be done by leaving the amount as it is, because the defendant is always entitled to move to have the amount changed.

J. R. Cartwright, K.C., in reply: There can be no motion to vary the amount of alimony without a change of circumstances.

The trial judge has not found that the defendant's sullen answers, etc., were cruelty. He found the cruelty only in the "spectre" of the other woman. Dr. Graham's evidence is that the only possible condition of reconciliation was a complete break with Mrs. Graae. A wife is not entitled to tell her husband that he must break with another woman, or she will leave him and make him support her.

29th June 1945. ROBERTSON C.J.O.:—This is an appeal by the defendant from the judgment of Chevrier J., dated 7th December 1944, after the trial of the action before him at London, by which he awarded the respondent alimony. The appellant disputes, on this appeal, the right of the respondent to alimony, and, alternatively, he asks that the award of \$100 per month be reduced.

The appeal, in so far as the right to alimony is concerned, does not involve any new principle of law. The question is whether the facts of the case bring it within the principle of such cases as *Lovell v. Lovell* (1906), 13 O.L.R. 569 and *Burns v. Burns and Fredericks*, [1944] O.R. 561, [1944] 4 D.L.R. 513. The appellant contends that in this case the principle has been extended further than has heretofore been done.

The appellant and the respondent were married on the 12th May 1920. They lived together until 2nd June 1944, when the respondent left her home. They have two children, a son aged 23, who is absent on war service in the Air Force, and a daughter aged 20, who is a nurse in training in a hospital in Toronto. During all their married life together the husband and wife were farmers in the county of Middlesex, first upon a farm in the township of London that the husband owned, and, since 1934, upon a farm in the township of Lobo that the husband inherited under his father's will, subject to certain charges. This latter farm, containing 200 acres, with good buildings, is said to be one of the finest farms in the county of Middlesex.

Husband and wife, with their two children, lived happily together until the latter part of 1938, or early in 1939, when the husband, contrary to his custom, began to absent himself from home without telling where he went, either before or after his return. Such absences gradually became more frequent. From about once a month they became once in two weeks, and gradually became more frequent, until they were two or three times a week. Generally, the absences were in the evenings, and at times they extended to one or two o'clock in the morning. Sometimes he went away for week-ends or holidays. Always he evaded or ignored requests by his wife for information as to where he had been. In time she began to suspect that some other woman was the attraction. This suspicion was definitely confirmed in 1941, in the manner disclosed in the evidence.

In October 1941 the appellant required some surgical attention, and went to Toronto, and an operation was performed there. The respondent has a brother who is a doctor of medicine in Toronto—a man eminent in his profession and of undoubted integrity. He accompanied the appellant to the hospital and visited him there on occasions, after the operation. On the first of these visits the appellant told the doctor that things were unhappy at home, but said that it was something that it was not very nice to talk about, and he gave no further information. The doctor was surprised, as he had no suspicion of anything of the kind. On his next visit to the appellant at the hospital a lady was present in the room, a stranger to him, to whom the appellant introduced him—a Mrs. Graae. The doctor did not remain, but, acting on a suggestion from him, the doctor's wife, who had always been on excellent terms with the appellant, went to the hospital to see him. The appellant told her also that things were unhappy at home, and that there was a good deal of irritation, and he gave as the chief source of the trouble the fact that his mother lived with them, under a condition imposed by the will of his father. As the appellant continued to talk of the unhappiness at home, the doctor's wife asked him plainly if there was another woman in the case, but he did not give her a straight answer. On a later visit to the hospital she also found Mrs. Graae there, at 10.30 in the morning "taking off her hat and coat, and her furs draped over the chair, very much at home".

As the result of these occurrences the doctor made the suggestion to the appellant that before the latter went home the doctor and his wife should go up to the farm and discuss matters with the respondent. The appellant approved of this, and they went up accordingly.

The information regarding Mrs. Graae given the respondent on the occasion of this visit was the first information the respondent had of an intimacy between Mrs. Graae and her husband, and, confirming the suspicions she had had of the occasion of his frequent absences from home, she was much upset by it.

After this visit to the farm the doctor's wife again visited the appellant at the hospital. She told him that his wife was devoted to him, but was suspicious about a woman. She insisted

that the appellant answer her question, "Is there another woman?" and finally he answered, "Yes." After further discussion he agreed that he would try to drop this woman.

On appellant's return home from the hospital the respondent says that he was in a penitent mood and shed a few tears. He remained at home for a few days, but before long he resumed his visits to Mrs. Graae, and soon he was seeing her as before, leaving the farm sometimes at three o'clock in the afternoon, and often remaining away until one or two in the morning.

Mrs. Graae lives in London, where she operates a "beauty parlour". She lives in an apartment in the rear of her business place. She has a son of about 20 years, who is in the Air Force, and who lived at the apartment with her when home on leave. Otherwise, she lived alone. The appellant had a key to the back door of the building in which the apartment is located. At times he parked his motor car in a lot in the rear of the building, and by ascending an outside stairway he would reach the back door to which he carried a key. That a close intimacy existed between the appellant and Mrs. Graae the appellant cannot well deny. He does deny adultery, but he admits that as recently as 6th August 1944 he went, in company with Mrs. Graae, on a trip to Detroit, where they stayed overnight with Mrs. Graae's sister, returning home the next day. How candid and frank the appellant is in his admissions in regard to his conduct with Mrs. Graae may well be open to question. He admitted to his sister-in-law, the doctor's wife, that he had treated his wife "like a heel". When counsel, in cross-examination, put this to him, "Then I take it you do not think you are justified in your actions in running around with Mrs. Graae", his answer was, "I do not think the Church or the social laws of this Dominion would grant me justification in such a manner, but, no doubt, having turned the other cheek probably seventy times seven, you eventually get to the place where such means less to you than it formerly did."

The course of conduct that I have briefly indicated the appellant followed continued over a period of years, and until his wife left him in June 1944 and went to live in an apartment in London. She claims that as the direct result of his conduct her health became gravely impaired, and her condition was such that, according to competent medical advice, it was imperative that she should live elsewhere, to avoid serious and permanent

injury to her health. There were negotiations at one time in regard to a separation, but the negotiations fell through. In the witness-box the appellant expressed his willingness to give up his association with Mrs. Graae and to receive the respondent back in his home, but the learned trial judge was of the opinion that this offer was not made in good faith. The case then seems to stand or fall upon the evidence as to the effect of the appellant's misconduct upon the respondent, in the way of impairing or endangering her health, with, perhaps, this further consideration that, as I think the evidence indicates plainly enough, the appellant continued his intimacy with Mrs. Graae in the full knowledge of its effect upon his wife's health, and with a good deal of indifference in regard to it, and the probable consequences.

The respondent is 55 years of age. She had always been a woman able to do her own housework on the farm, and to help, at times, also with the work in the fields, cutting hay, helping drive the hay-fork and so on. As the result of her husband's conduct that she complains of, she says that she was unable to sleep, that it was hard for her to eat, and that she lost from 10 to 12 pounds in weight. Her daughter confirms the respondent's statements as to these matters. Her mother shared her room with her after some date in 1941, and she says her mother did not sleep well. She would wake up and find her mother awake, usually waiting for the appellant to come home. The daughter also says her mother often would not eat anything in a meal. She says her mother was very worried and nervous. Respondent's brother says that it was noticeable in 1941, and still more so in the summer of 1942, that the respondent had lost weight, and that she looked worried and older. He said his knowledge did not leave any manner of doubt that the continuation of her apparent state of health had only one end—a nervous breakdown. When he next saw her after the summer of 1942 her condition was not as satisfactory as before. Her condition in 1943 was less satisfactory than in 1942, and in the winter of 1943-44, when he saw her last prior to June 1944, her condition was less satisfactory than on the last occasion he had seen her before that. There was therefore, at least from 1941 on, according to his observation, a progressive deterioration in the respondent's condition. He considered it to be the natural consequence of the misconduct of the appellant, and of the constant strain

under which the respondent lived. He warned the respondent that she must not let the impairment of her health proceed to a point where she might have a breakdown, but should let him know.

Dr. Wilcox, who practises in London and is a specialist in nervous disorders, examined the respondent on 5th June 1944, she having been referred to Dr. Wilcox by her brother. He made a thorough examination and found her to be "very nervously upset", but found no evidence of organic disease. He advised that she should get away from the environment in which her troubles had developed. He did not regard her as being a nervously unstable individual in any sense of the term, but rather the reverse. At the time of the trial, according to Dr. Wilcox, the respondent's state of health was improving steadily. She had returned to normal sleep, that is, without a sedative, and had gained substantially in weight, but he would expect a relapse if she returned to her former environment. Other witnesses, including the respondent herself, testify to the improvement in her health since living apart from the appellant. This, in the opinion of both Dr. Wilcox and the respondent's brother, is a clear indication of the cause of the former impairment in her health.

The appellant did not attempt to dissuade the respondent when she informed him that she was leaving. He did not even ask her where she was going, but she told him she was going to London and had an apartment there. He had not since, nor until the time of the trial, asked her to return, nor had he even seen her, except in the Court House. At the trial, while in the witness-box, he said that he was willing to have his wife return; that the house was open and she was welcome to come. He also said that he would give a solemn undertaking to desist from any such conduct as that of which his wife had complained, if she returned home. In view of the opinion of the learned trial judge, who heard the appellant, that he could find no evidence of good faith, either as to the manner in which the undertaking was made, or as to appellant's demeanour at the time at which he made it, and that the best he could say about it was that it was simply lip-service, I think we need not concern ourselves with his offer.

The appellant did not, either by his own evidence, or the evidence of any witness, challenge the statements made by the

respondent and her witnesses in regard to the impairment of her health while she continued to live with him. He does suggest other causes for it than his relations with Mrs. Graae and the neglect of his wife that was concurrent with them. He says she was displeased with living conditions after their removal to his father's farm, and particularly with his mother living there with them. The fact, however, would seem to be that, while the respondent would have been happier to have had their home to themselves, she lived without any impairment of her health, under whatever conditions existed from 1934, until the appellant's relations with Mrs. Graae developed.

The learned trial judge found, as a fact, that the conduct of the appellant was such as to come within the purview of the decision in *Burns v. Burns and Fredericks, supra*, and that it amounted to legal cruelty as defined in the cases, such as justified the respondent in living apart from her husband.

Appellant's counsel argued that to hold that the conduct relied upon for the respondent justified her in leaving her husband's home and claiming alimony would be to place unreasonable restrictions upon a husband's liberty, making him the slave of the whims and fancies of an unreasonable wife, and would be a precedent for awarding alimony in circumstances in which it has not been granted before. Counsel gave illustrations that he submitted supported his argument. In all of them, however, there was lacking the element that is the gist of the offence in the present case. The placing of another woman before his wife, seeking pleasure and comfort in her company alone, his secretiveness, the time and place of their frequent meetings, all suggestive of something illicit and to be concealed from his wife, and the long continuance in this course of conduct, wholly in disregard of his wife's protests and of the serious consequences to her health, are not to be passed over as within the husband's privilege. When confronted with the question whether he thought he was completely justified in doing anything he had done, the appellant was forced to admit, after some evasion, that "nobody who takes the marriage vows, and takes them seriously and takes the responsibility of children in the home, could ever think of such a thing". The appellant knows best what his conduct has been, and he has shown no disposition to judge himself harshly.

In my opinion the learned trial judge took the proper view of the gravity of the appellant's misconduct and of its consequences, so far as the effect of it upon the respondent's health is concerned, and he was right in holding that it amounted to legal cruelty, and that the case comes well within the principle of the cases of *Lovell v. Lovell* and *Burns v. Burns and Fredericks*, hereinbefore cited. The appeal on this issue should, therefore, be dismissed and the appellant should pay the costs of the appeal.

As to the amount of alimony that should be awarded, the evidence is not entirely satisfactory. Perhaps the chief reason for this is the fact that the appellant does not keep records from which his annual income can, with any certainty, be ascertained. No such records were produced. The trial judge plainly did not accept the appellant's evidence as a dependable statement of his yearly income, and it has quite obvious omissions, as, for example, the value of such part of his living as the farm itself supplied. We were informed by counsel, and it was not challenged, that the appellant has not, in fact, paid up the interim alimony agreed upon between solicitors, pending the action, and he has paid nothing since the trial. A fair disposition of the matter would be to allow the appellant to have a reference to the Local Master at London to fix the amount of alimony he should pay, but on condition that he first pay the interim alimony, at the rate agreed upon, to the time of trial, and alimony at \$100 per month from that time until the Master's report is made. The Master is not to be bound in any way to the sum of \$100 per month, but shall fix such sum as is warranted, in his judgment, by the evidence before him. The appellant is also to pay the costs of the reference, if the amount of alimony to be paid under the judgment is not reduced, and, in any event, the appellant is to pay the respondent's disbursements on the reference.

GILLANDERS J.A. agrees with ROBERTSON C.J.O.

LIDLAW J.A. (*dissenting*):—After anxious and careful consideration I am unable to agree that the respondent is entitled in law to recover payment of alimony from the appellant. It is alleged by the respondent that the appellant's "conduct and behaviour towards her during the past several years, including acts of physical violence and mental cruelty, have had a permanent

and injurious effect upon her health, so much so that she was unable to continue living with the defendant [appellant]". In the statement of claim it is set forth that the appellant "has apparently lost all affection for the [respondent] and has displayed towards her an attitude of complete indifference In addition [he] has become enamoured of another woman with whom he has been associating for a number of years." A charge of "adultery on divers occasions with the said woman" is made against the appellant. But the learned judge finds "there was no actual physical violence on the part of the defendant [appellant] towards the plaintiff . . . that at no time did he use physical force". He finds also that "the plaintiff has failed to establish the commission of adultery".

The basis upon which the learned judge awarded alimony is that the "unjustifiable association" between the appellant and Mrs. Graae amounts to "cruelty of a legal nature". I quote his words in part as follows: " . . . what can there be more cruel to a wife's mind, and the consequential impairment of her physical health and her mental condition, than that torturing vision of a woman replacing her in her husband's affections and that continual entry into the holy bonds of matrimony? That spectre alone would be legal cruelty"

There can be no doubt that in a proper case alimony may be awarded where there is no personal violence and no threats of it: *Lovell v. Lovell* (1906), 13 O.L.R. 569; *Burns v. Burns and Fredericks*, [1944] O.R. 561, [1944] 4 D.L.R. 513. But as I emphasized in *Burns v. Burns and Fredericks, supra*, at p. 567, I am of the opinion that such cases ought to be admitted with great caution. See also *Lovell v. Lovell, supra*, per Moss C.J.O. at p. 570. I cannot agree with the opinion of the learned trial judge that the "spectre alone" of another woman replacing her in her husband's affections and "that continual entry into the holy bonds of matrimony" would be legal cruelty.

Is it to be held that a woman's worry over the loss of her husband's love, loyalty or faith, or even over his sin is, in itself, sufficient ground upon which to make him liable to pay alimony to her, even if her worry continues to the point where her health is endangered? Proof of critical hurt or injury to health, or reasonable apprehension thereof, occasioned by worry about a husband's wrongdoing, is not alone sufficient successfully to support a claim for alimony. Nor does the character of the

wrongdoing determine the right. A husband might be at fault as judged by his wife, by reason of conduct ranging from the most innocent neglect of attention towards her to the most serious of crimes. She might suffer mental distress of a severe kind merely because he absented himself from her company more frequently than she wished, or he might be a weak-willed person who repeatedly engaged in criminal acts. At the same time his conduct towards his wife might otherwise be unimpeachable. Counsel for the respondent argues that a woman might secretly worry herself into a dangerous state of health because of her husband's conduct, innocent or otherwise, and that even though she does not disclose her thoughts or "spectre" to him, she can nevertheless recover alimony. I cannot accept that argument. It is then said that a husband who knows the mental distress being caused to his wife by a course of conduct on his part, and thereafter persists in it notwithstanding the result is guilty of matrimonial cruelty. But it is not my understanding that a husband is bound in law to conduct himself towards others in accordance with his wife's requirements, or desist from a course of conduct, even though his refusal causes a continuance of worry or distress to her, or that she can compel him to make payment of alimony for the result to her health merely by reason of the exercise by him of a liberty or even licence. My view is that the injurious effect to her health, or reasonable apprehension thereof, must result from his conduct and behaviour towards her as distinguished from his conduct in relation to other persons. He must, I think, be guilty of treatment in his actions done in his association with her so that directly by the exercise of wrongful force, physical or mental, he produces in her a state of health amounting to danger or reasonable apprehension thereof.

The evidence discloses that the respondent worried greatly from 1939 to 1941 because the appellant was away from home with increasing frequency, although during that period she had only suspicions that he was associating with another woman. In 1941, when she learned that he was attached to Mrs. Graae and associating with her, she endeavoured to have him cease his attentions to her. He admitted to the respondent that he had not used her very well. He admitted that there was another woman, but he would not answer his wife's questions as to his actions and activities. He did not flaunt another woman before

the mind of the respondent, nor torture her by his words as was the case in *Burns v. Burns and Fredericks, supra*. I think he was a weak-willed individual who was for the most part unable to resist the attraction and society of another woman. But in part, too, he was influenced by an unhappy environment in his own home. Until 1934, when he and his family moved to the farm bequeathed to him by his father, the respondent says "we were as happy as any other couple". But she admits that in "the last year or the last seven or eight months" the parties were together she may have tried to make things disagreeable for him. Also, that he had had a good deal to put up with from her over a period of years. There can be little doubt that the household was an unpleasant, unhappy place to live.

The conditions under which the appellant and the respondent lived must also be considered from the standpoint of effect on the respondent's health. She was subjected to constant association with the appellant's mother. She says: "I found Mrs. McInroy a difficult woman to live with. . . . she didn't like me . . . she always resented me." There was what is described in the evidence as a "feeling of uneasiness", "a kind of under-current". The daughter of the parties testified that the attitude of Mrs. McInroy senior towards the respondent particularly was "most unpleasant" and "she showed it more the longer we lived there". My conclusion from the evidence is that the health of the respondent was broken, and she left her home, not because of the appellant's conduct alone, but also because of the unpleasant and unbearable attitude towards her of Mrs. McInroy senior. The effect of that attitude and environment on the respondent's mind was substantial, and it is shown plainly in evidence given by her which I quote as follows:

"HIS LORDSHIP: Would you care to return to live with your husband on the farm?

"THE WITNESS: My answer to that would be that I could not go back under the circumstances with Mrs. McInroy senior, in the picture, and with this woman in the picture, and, furthermore, I have not given it any more thought beyond that."

"Q. And, if this woman in the picture was eliminated, but Mrs. McInroy senior, was still there, would you be willing to go back? A. I don't think I could."

It may be observed that the medical evidence on behalf of the respondent does not show that the conduct of the appellant

was alone the cause of her ill-health. Dr. Wilcox says, "from my survey of her, as an individual, I think it is a situational condition" and explains the term "situational" to mean the "environment in which she had been living". Dr. Graham was asked for his opinion as regards her health if the situation of "worry and anxiety at home" continued, and she had stayed there. He replied that she would have a nervous breakdown, "and that would necessitate a change of environment".

When, as I conclude, the cause of the respondent's ill-health is twofold, namely the difficult, unpleasant and unhappy association with Mrs. McInroy senior, and the association of the appellant with another woman, and the first of these things substantially contributes to the unfortunate result, I respectfully express the opinion that no judgment for alimony can be given. Therefore, for the reasons I have given, I would allow the appeal and dismiss the action. In the exercise of my discretion, I would allow no costs in this court or the court below.

Appeal dismissed with costs, LAIDLAW J.A. dissenting.

Solicitor for the plaintiff, respondent: George L. Mitchell, London.

Solicitors for the defendant, appellant: Vining, Dyer & Grant, London.

[COURT OF APPEAL.]

Dennison et al. v. Sanderson et al.

Defamation—Qualified Privilege—Malice—Charge to Jury—Amount of Damages—The Libel and Slander Act, R.S.O. 1937, c. 113, s. 4.

Sixteen actions were brought for libel, based upon a newspaper advertisement attacking the plaintiffs, who were all candidates for municipal office at an election in Toronto, representing the same political party. The actions were consolidated, and were tried with a jury. The trial judge ruled that the words were capable of a defamatory meaning, and that the occasion on which they were published was one of qualified privilege. He left to the jury the question whether or not there was a libel, the question of malice, and the assessment of damages. The jury awarded damages of one cent to each of two plaintiffs, and found for the defendants in the other fourteen actions. All the plaintiffs appealed, and the defendants cross-appealed in the two actions in which the verdicts had been for the plaintiffs. They also appealed, by leave, against the award of costs to those two plaintiffs.

Held, all the appeals must fail.

As to the two plaintiffs who had been awarded nominal damages, the jury must have found that the words published were libellous, and that there had been express malice. This made it unnecessary to consider the appellants' contention that the judge had been wrong in ruling that the occasion was privileged, and in not telling the jury expressly that the words were clearly defamatory. There was nothing unfair or improper in the trial judge's charge as to the quantum of damages, and a jury was not necessarily perverse if it took a less serious view of a seemingly venomous attack, made in the heat of an election campaign, than the parties assailed. The jury were peculiarly the judges of the amount of damages to be awarded in a libel action. *Bray v. Ford*, [1896] A.C. 44; *Jones v. E. Hulton & Co.*, [1909] 2 K.B. 444; *Wilson v. London Free Press Printing Co.* (1918), 44 O.L.R. 12, applied. They might take into account that there had been no real damage, even in the case of a malicious libel. *Cooke v. Brogden and Co.* (1885), 1 T.L.R. 497, applied.

As to the other fourteen plaintiffs, the jury having returned a general verdict, it was impossible to say what findings they had made, and it could not be said whether they found no libel, no malice, or merely no damages. It seemed a safe assumption, however, that even if they had taken a view favourable to the plaintiffs upon the other questions, they would at most have found negligible damages. Section 4 of The Libel and Slander Act provided that the jury were not required to find for the plaintiff merely on proof of publication, and of a defamatory meaning. Further, it was not the usual practice to order a new trial to enable a plaintiff to recover merely nominal damages. *Milligan v. Jamieson* (1902), 4 O.L.R. 650; *Scammell v. Clarke* (1894), 23 S.C.R. 307; *Simonds v. Chesley* (1891), 20 S.C.R. 174, applied. As to the defendants' appeal, no ground had been shown on which it could succeed.

APPEALS in sixteen actions for libel, consolidated by order of the Master, and tried by Mackay J. and a jury. The result of the proceedings below, and the nature of the appeals, sufficiently appear from the above headnote, and from the reasons for judgment.

22nd, 23rd, 26th and 27th November 1945. The appeal was heard by ROBERTSON C.J.O. and HENDERSON, GILLANDERS, LAIDLAW and ROACH JJ.A.

J. R. Cartwright, K.C., for the plaintiffs: The learned trial judge was wrong in telling the jury that the advertisement was published on an occasion of qualified privilege, and this error was of such a nature as to constitute a mistrial. The ruling threw upon the plaintiffs the onus of proving express malice, which is a most difficult thing to prove: *Levi v. Milne* (1827), 4 Bing. 195, 130 E.R. 743; *Lockhart v. Harrison* (1928), 139 L.T. 521, 44 T.L.R. 794. The trial judge held that Sanderson, in publishing the advertisement, was acting in the performance of a social or moral duty, or at least in pursuance of an interest mutual in character, to advise other citizens of facts which he honestly believed to be true, even if he was mistaken. There is no authority for such a proposition. Whatever such privilege may exist, it does not extend to publishing alleged facts to all the world in a newspaper: *Duncombe v. Daniell* (1837), 8 C. & P. 222, 173 E.R. 470; *Standen v. South Essex Recorders, Limited et al.* (1934), 50 T.L.R. 365; *Campbell v. Spottiswoode* (1863), 3 B. & S. 769, 122 E.R. 288; Gatley on Libel and Slander, 3rd ed. 1929, pp. 251, 277, 279; *Chaplin v. Ellesmere et al.*, [1932] 2 K.B. 431; *Bethell v. Mann*, *The Times*, 29th October 1919; *Lang v. Willis* (1934), 52 C.L.R. 637 at 667, 672.

Adam v. Ward, [1917] A.C. 309, is not an authority against us. It merely decided that a person attacked in a public forum (there, the House of Commons) was entitled to reply in a similar forum. Here there was no attack; the advertisement "Forward with the C.C.F." attacked no one, but was merely election propaganda. Sanderson's allegations were in no way an answer to that advertisement.

The furthest that the cases go in connection with elections is that an elector may say what he honestly believes as to the capabilities of a candidate; nowhere has it been decided that this may be done through the medium of a newspaper: *Duncombe v. Daniell*, *supra*. There is no evidence that publication in a newspaper was the only way Sanderson could communicate his material to the electors: *Brown v. Croome* (1817), 2 Stark. 297, 171 E.R. 652.

Qualified privilege can be considered only after the defendant has affirmatively proved his honest belief in the matters alleged. Here the reverse has been established, for Sanderson has admitted that his allegations were based, in part at least, upon information picked up on street corners. There were numerous

indicia of actual malice in addition to this, such as the defendants' failure to heed the warning telegram, sent after a similar advertisement appeared in another newspaper. [LAIDLAW J.A.: If it were established that publication in the newspaper was the only means of communicating the information to the public, would such publication be privileged?] There is no evidence to establish that fact: *Brown v. Croome*, *supra*, at p. 301. [ROACH J.A.: The plaintiffs chose this newspaper as a means of expressing their views. Would that not justify Sanderson in using the same medium?] Not to libel the plaintiffs: *Anderson v. Hunter* (1891), 18 R. (Ct. of Sess.) 467 at 468.

[ROBERTSON C.J.O.: Your point is that qualified privilege is a qualified defence for publishing defamatory statements which are not true, and that if the defendant does not believe that what he publishes is true, there is no privilege?] Yes, and Sanderson admitted on his examination for discovery that he gathered information on street corners. [ROBERTSON C.J.O.: There is a difference between a privileged occasion and a privileged communication.]

Even if this occasion had been one of qualified privilege, there are two or three other grounds on which the defendants are not entitled to protection.

Section 7 of The Libel and Slander Act, R.S.O. 1937, c. 113, shows clearly that publication in a newspaper of allegations concerning a candidate for election are not protected by qualified privilege. If such a publication were deemed to be made on an occasion of qualified privilege, subs. 2 would be wholly unnecessary, as the publisher would have all the protection there accorded, and more. The doctrine of qualified privilege should not be extended to statements made in an election campaign, for reasons of policy stated by Cockburn C.J. in *Campbell v. Spottiswoode*, *supra*, at p. 777; *Cassidy v. Daily Mirror Newspapers, Limited*, [1929] 2 K.B. 331.

The defendant Sanderson has not proved any circumstances imposing a duty upon him to publish these allegations. The onus is clearly on him in this respect: *Gatley*, *op. cit.*, p. 314; *Hebditch v. MacIlwaine*, [1894] 2 Q.B. 54; *Odgers on Libel and Slander*, 6th ed. 1929, p. 568; *Davies v. Snead* (1870), L.R. 5 Q.B. 608 at 611; *Waller v. Loch* (1881), 7 Q.B.D. 619. Sanderson did not go into the witness-box at the trial to testify as to his sources of information. There can be no duty on a person to

repeat gossip heard on street-cars and street corners, and no privilege could possibly arise in such a case. Sanderson's manner of gathering his information was an important factor to be considered by the trial judge in determining whether or not the occasion was privileged: *Stuart v. Bell*, [1891] 2 Q.B. 341 at 359-60; *Rumsey v. Webb et ux.* (1841), Car. & M. 104, 174 E.R. 429.

Even if there were such a privilege, it could extend only to a person who was himself an elector, and Sanderson has not proved that he was one: *Duncombe v. Daniell*, *supra*; *Wisdom v. Brown* (1885), 1 T.L.R. 412; *Anderson v. Hunter*, *supra*; *Bruce v. Leisk* (1892), 19 R. (Ct. of Sess.) 482.

If, as we submit, the trial judge was wrong in his ruling that the occasion was one of qualified privilege, then all his instructions to the jury as to malice would merely confuse the issue, and we are entitled to a new trial on this ground.

The trial judge told the jury that the words of the article were capable of a defamatory meaning, but that the question whether or not they were in fact defamatory was entirely for them to decide. The words were so clearly and obviously defamatory (*e.g.*, the allegations that the plaintiffs were running for election to assist in the advancement of the communist party, then an illegal organization, and that one of them had "knifed in the back the men and women of our armed forces") that the trial judge should not have left the question to the jury, but should have told them that the words were defamatory, and directed them to find for the plaintiffs on this issue.

In the alternative, if the trial judge's direction on this issue was adequate, then the general verdict for the defendants in the actions of the fourteen plaintiffs, if based on a finding of "no libel", is perverse, and should be set aside: *Levi v. Milne*, *supra*; *Odgers*, *op. cit.*, p. 102.

As to the appeal of the two plaintiffs who were awarded damages of one cent each, the trial judge's ruling as to qualified privilege was obviously material to the question of damages, and, if wrong, entitles us to a re-assessment of damages. The question of the improper admission of evidence [dealt with *infra*] applies in these appeals also, as it may be argued that the evidence was admissible in mitigation of damages in these cases. That cannot be correct, because no particulars were given, as required by Rule 158.

The trial judge told the jury that they might award "contemptuous damages", if they thought that the defendants had just crossed the border-line, but that the action, in their opinion, should not have been brought. He did not tell them, however, that such damages could be awarded only if some ground for doing so appeared in the evidence, and that they were not entitled to award them through a mere whim.

If the trial judge's charge is to be taken as correct, then, having regard to the grossness of the defamation of these plaintiffs, an award of one cent was clearly perverse, and should be set aside: *Gatley, op. cit.*, pp. 739-41; *Falvey v. Stanford* (1874), L.R. 10 Q.B. 54; *Mechanical and General Inventions Company, Limited et al. v. Austin et al.*, [1935] A.C. 346.

The new trial we seek for these plaintiffs should be limited to an assessment of damages: *English and Scottish Co-operative Property Mortgage and Investment Society, Limited v. Odham's Press, Limited et al.* (1939), 56 T.L.R. 195.

As to the defendants' cross-appeal as to costs in these two actions, the award of costs was quite proper, even though the damages awarded were so small. Where, as here, there has been no misconduct or oppressiveness on a plaintiff's part, the Court will not deprive him of his costs merely because the jury have awarded only nominal or contemptuous damages. The trial judge should exercise his discretion as to costs unfettered by any expression of the jury's views: *Gatley, op. cit.*, pp. 744 *et seq.*, particularly p. 748; *Mayer v. Glover*, *The Times*, 30th April 1926; *O'Connor v. The Star Newspaper Company Limited* (1893), 68 L.T. 146 at 147, 148; *Martin v. Benson*, [1927] 1 K.B. 771 at 774; *The Judicature Act*, R.S.O. 1937, c. 100, s. 75.

F. A. Brewin, for the plaintiffs, appellants: The trial judge permitted the defendants to put in extracts from the examinations for discovery of some of the plaintiffs, relating to their connection, or supposed connection, with certain persons and organizations. This evidence was irrelevant to the issues, and prejudicial to the plaintiffs' case, and should not have been admitted. There was no evidence that any of these matters were known to Sanderson, so as to form a basis for his allegations, and the statement of defence, giving particulars of the basis of his comments, did not include these matters. The defendants must confine their evidence to the particulars which they have given as to the facts relied on to establish the defence of fair

comment: *Gatley, op. cit.*, p. 742; *Augustine Automatic Rotary Engine Co. of Canada Limited v. Saturday Night Limited* (1917), 38 O.L.R. 609, 34 D.L.R. 439; *The Aga Khan v. Times Publishing Company*, [1924] 1 K.B. 675 at 680.

The only possible relevancy of this evidence would be in mitigation of damage, as tending to diminish the plaintiffs' reputations, and it is of a nature not admissible under this heading: *Scott v. Sampson* (1882), 8 Q.B.D. 491; *Odgers, op. cit.*, p. 428; *Gatley, op. cit.*, pp. 751, 752, 793; *Hobbs v. Tinling (C. T.) and Company, Limited*; *Hobbs v. Nottingham Journal, Limited*, [1929] 2 K.B. 1. Further, no particulars were given, as required by Rule 158.

C. F. H. Carson, K.C. (J. L. McLennan with him), for the defendants Globe Printing Company and McCullagh, respondents and cross-appellants: The trial judge was right in ruling that the occasion was one of qualified privilege. Both the C.C.F. and the communists are national political parties, and not only voters in Toronto, but everyone in Canada, had an interest in this election, and in the success or failure of the C.C.F. slate. The plaintiffs had been selected to represent their party, and the advertisement "Forward with the C.C.F.", which appeared in the Toronto papers immediately before the election, was a piece of partisan propaganda which invited an answer from anyone interested in the election. It should be noted that in this advertisement the plaintiffs were put forward, not as individuals, but as the party candidates. Our advertisement was merely an answer to the statement, in the earlier one, that the plaintiffs were outstanding citizens. There is no basis for the contention that we suggested that the C.C.F. campaign was organized to ensure the election of communist candidates.

The argument that the privilege does not extend to publication to the whole world is not supported by the cases. *Duncombe v. Daniell* (1837), 8 C. & P. 222, 173 E.R. 470, was decided over a hundred years ago, and the law has advanced considerably since then.

The following authorities support the trial judge's ruling that the occasion was one of qualified privilege: *Gatley, op. cit.*, pp. 214, 250, 280; 20 Halsbury, 2nd ed. 1936, pp. 473-4; *Wisdom v. Brown* (1885), 1 T.L.R. 412; *Jenoure v. Delmege*, [1891] A.C. 73; *Pittard v. Oliver*, [1891] 1 Q.B. 474 at 477; *Mangena v.*

Wright, [1909] 2 K.B. 958 at 977; *Adam v. Ward*, [1917] A.C. 309 at 321, 324, 328, 334, 339, 342, 343.

Bona fides must always be presumed until its existence is disproved. The cases are against the argument that the defendant must affirmatively establish, first, his belief in his statements of fact, and, secondly, that the press was his only means of publication. In any case, the "Globe and Mail" for the day on which this advertisement appeared shows that many people were using it as a means of publishing their ideas. It is clear that it was the only available medium at that stage.

The jury's verdict, in the cases of the fourteen plaintiffs, was not perverse: *Gatley, op. cit.*, p. 727, and cases there cited. The jury may have taken the view that this article was not defamatory; they may have thought, quite rightly, that persons seeking public office must not be "thin-skinned"; they may have thought the advertisement was directed at a political party rather than at individuals. It is more in the public interest that an occasional person should suffer an unjust criticism than that the members of the public should be restricted in their expressions of opinion on public matters.

The judge was obviously right in explaining the law as to malice to the jury, and in telling them that the onus in this respect was on the plaintiffs.

The proper course is for the judge to define what is a libel in point of law, and then leave it to the jury to say whether the publication in question falls within that definition: *Broome v. Agar* (1928), 44 T.L.R. 339 at 340; *Lockhart v. Harrison* (1928), 44 T.L.R. 794; *Parmiter v. Coupland et al.* (1840), 6 M. & W. 105 at 107, 151 E.R. 340; *Gatley, op. cit.*, p. 718. [ROACH J.A.: Is not such a charge as was here made of necessity defamatory?] I think not. [ROBERTSON C.J.O.: Must not the trial judge tell the jury whether the words are capable of a defamatory meaning?] The plaintiffs here abandoned the innuendoes pleaded.

The extracts from the examinations for discovery were clearly admissible, as showing the foundation for Sanderson's honest belief in the truth of what he published. The occasion being one of qualified privilege, there is a presumption that he had an honest belief, and these extracts strengthen that presumption. It is quite proper to ask persons on street corners for

their opinions—the procedure rather resembles the taking of a Gallup poll.

As to the two plaintiffs who were awarded damages, the assessment was quite proper. The amount of damages, in an action for libel, does not depend upon a legal rule, and is peculiarly within the jury's province: *Gatley, op. cit.*, pp. 467, 702, 739. No evidence was given of any damage to these plaintiffs; they did not go into the witness-box.

As to our cross-appeal in the fourteen actions, the trial judge should have dismissed these actions, either at the close of the plaintiffs' case, or at the close of the evidence, or after the jury's verdict: *Skeate v. Slaters, Limited*, [1914] 2 K.B. 429 at 434, 438. *Bona fides* being presumed, and the onus being on the plaintiff to prove express malice as a real fact, the actions should fail merely because there was no evidence of malice. All the indicia of malice relied on by counsel for the appellants are equally consistent with Sanderson's belief in the truth of his allegations. Where the evidence is equally consistent with malice or *bona fides*, the trial judge should withdraw the case from the jury: *Gatley, op. cit.*, pp. 316, 636; *Somerville v. Hawkins* (1851), 10 C.B. 583 at 590, 138 E.R. 231; *Adam v. Ward, supra*, at pp. 330, 334, 339, 343.

The statements of claim disclosed no cause of action, and the actions should have been dismissed on the motion made at the opening of the trial. This was specifically pleaded in the statements of defence. There was no allegation in the statements of claim that by reason of the article complained of the plaintiffs had been brought into hatred, contempt or ridicule; without such an allegation the pleadings do not disclose a cause of action: *Gibson v. McDougall* (1919), 17 O.W.N. 157 at 158; *McDonald v. Mulqueen* (1922), 53 O.L.R. 191 at 195; *Gatley, op. cit.*, p. 36. For the proper form of pleading, see *Gatley, op. cit.*, pp. 797 *et seq.*; *Odgers, op. cit.*, pp. 622 *et seq.*; *Fraser on Libel and Slander*, 7th ed. 1936, pp. 301 *et seq.*; *Holmsted and Langton, Forms and Precedents*, 35th ed. 1936, pp. 94-5.

Even if the verdict of one cent in favour of the other two plaintiffs is upheld, they should not be awarded their costs. The damages are clearly contemptuous, indicating the opinion of the jury that the action ought not to have been brought: *Wood v. Cox* (1889), 5 T.L.R. 272; *O'Connor v. The Star Newspaper Company Limited* (1893), 68 L.T. 146.

H. W. Cavell, for the defendants Reliable Exterminators, Limited and Sanderson, respondents and cross-appellants, adopted the argument for the other defendants, and had nothing to add.

J. R. Cartwright, K.C., in reply: This is a most important case for the guidance of persons interested in future elections. Must persons defamed in such circumstances assume the heavy burden of proving express malice? Had the facts here been true, the plea of fair comment might have been supported, but they were not true, and we contend that there was a breach of the defendants' duty to see that they were true. It may be that a wide interest was taken throughout Canada in this particular election, but nevertheless qualified privilege cannot exist unless the defendant is an elector and the defamatory matter is published to electors only: *The Telegraph Newspaper Company Limited et al. v. Bedford* (1934), 50 C.L.R. 632. *Pittard v. Oliver, supra*, does not establish that such a privilege exists, and is distinguishable on its facts. *Chaplin v. Ellesmere et al.*, [1932] 2 K.B. 431, is against the statement in 20 Halsbury, 2nd ed. 1936, p. 477, that privilege is not lost because of the exigencies of the situation. No matter what the circumstances may be, vindication, or reply to an attack, must be addressed to the same audience. Here there was not even an attack. *Rex v. Rule*, [1937] 2 K.B. 375, and *Harrison v. Bush* (1855), 5 E. & B. 344, 119 E.R. 509, are quite distinguishable on their facts from this case. No case was cited which lays it down that publication in a newspaper, in such circumstances as these, is protected by qualified privilege. *Duncombe v. Daniell, supra*, is cited as good law by both Gatley and Odgers.

Parmiter v. Coupland et al., supra, relied on by counsel for the respondents, must be taken as overruled by the decision of the House of Lords in *Lockhart v. Harrison, supra*.

The extracts from the examinations for discovery cannot be admissible in connection with Sanderson's belief in the truth of his charges, because there is no evidence at all that Sanderson was aware of these facts.

The fact that the two successful plaintiffs did not give evidence at the trial is no reason for awarding such small damages. There have been cases where plaintiffs obtained substantial damages without going into the witness-box.

Contemptuous damages do not vindicate the name of a plaintiff, and here there was a clear libel, of a serious nature, and these plaintiffs are entitled to substantial damages.

Cur. adv. vult.

3rd July 1946. ROBERTSON C.J.O.:—These are appeals in sixteen actions for libel that were consolidated by order of the Master, and were tried together at Toronto before Mackay J. and a jury. A verdict for the defendants was found in fourteen of the consolidated actions, and these fourteen actions were dismissed, with costs, by the judgment of the trial judge, dated 20th April 1946. From that judgment the fourteen plaintiffs appeal. In the remaining two of the consolidated actions the jury found for the plaintiffs, but awarded them as damages only one cent each. The judgment of the trial judge awarded these two plaintiffs the damages awarded by the jury, with costs of the action. These plaintiffs appeal from the assessment of damages, and ask a new assessment. The defendants cross-appeal in the two last-mentioned actions, asking that the actions be dismissed with costs. All appeals were heard together.

The libel alleged is the same in each of the cases, as are the innuendoes pleaded in each case. The alleged libel is in the form of an advertisement published by the respondent Reliable Exterminators, Limited and its manager, M. A. Sanderson, over the names of both of them, in the daily newspaper "The Globe and Mail", of which the respondent Globe Printing Company admits that it is the proprietor, and of which the respondent McCullagh admits that he is the publisher. "The Globe and Mail" is a morning paper, and has a circulation throughout the Province of Ontario. The alleged libel was published in the issues of the newspaper of 1st January 1944.

The appellants were candidates at the municipal elections in Toronto held on 1st January 1944. One of the appellants was a candidate for the Board of Control, and the others were candidates either for aldermen or for the Board of Education. The appellants are all members of a political party, the Co-operative Commonwealth Federation—popularly known as the "C.C.F."—and, with several others, they were put forward as candidates as members of that party. An advertisement under the heading "Forward with the C.C.F." was published in "The Globe and Mail" and in the "Toronto Daily Star" on 28th December 1943,

in which support at the municipal election was solicited for the appellants, who were described in the advertisement as C.C.F. candidates. This advertisement was set up in a conspicuous manner likely to attract general attention to it.

The advertisement of which the appellants complain was likewise set up in a conspicuous manner. It is much too long to quote. It occupies more than one-half of a full page of the newspaper, and is headed, "This is the Slate to 'Rub Out'—New Year's Day!" Under this heading appear the words:

"Even the Communists (now the Labour-Progressive Party); the Communist-controlled C.I.O. and the C.I.O.-controlled C.C.F. (National Fake Socialists) demand certain qualifications from their 'big shots,' and their political representatives, before nominating, electing or promoting them to 'big shot' jobs, or supporting them for political office. That is quite in order. It is just plain common sense.

"Therefore, it is quite in order and just plain common sense that the voters of Toronto should ask questions about, and know something of, the qualifications—and the background—of those candidates who seek their influence, their support and their vote."

After two further paragraphs, that I do not quote, comes the following:

"Personally, I believe that once the voters get a real line, for instance, on Alderman 'Stew.' Smith's and Alderman Dennison's background, they will back away from that pair and their 'strange bed-fellow,' Controller Duncan, as they would from a pole-cat."

Following this introductory matter the name of each of the persons listed as C.C.F. municipal candidates in the advertisement of 28th December to which I have referred appears separately, with statements about or comments upon each individually. This part of the advertisement is headed "HERE THEY ARE, HOLD YOUR NOSE AND READ THEM OVER." To give an example of what was said under the name of an individual candidate, I quote what is said under the name of the appellant Dennison:

"DENNISON, ALDERMAN WILLIAM—While Dennison is running as a C.C.F. candidate for the Board of Control, I suggest that if elected he will be a Communist rubber stamp. He has already indicated that his actions in Council will be governed by

instructions he receives from his Party—the Communist-controlled C.C.F.

“In 1940 when Dennison was on the Board of Education he and Trustee William T. Lawson, were the only two trustees who voted against a regulation requiring that all meetings held in public school buildings shall either open or close with ‘God Save the King.’ In 1940 Trustee Lawson who was—and still is—a Communist, was interned, along with ‘Stew.’ Smith, Joe Salsberg, Freed and twelve (12) others for subversive activities under the Defence of Canada Regulations.

“When Trustee Prof. George Grube attempted to delete from the Board of Education Regulations the religious test for applicants to positions in Toronto Public Schools, Dennison, who was then a trustee, actively supported Grube’s resolution. Grube is a professor at Toronto University and one of the ‘big shots’ in the Communist Party, as well as Vice-President of the Ontario C.C.F. (National Fake Socialists).”

After a separate paragraph under the name of each candidate of the C.C.F. party, commenting upon him or her, usually in a manner somewhat resembling the comments I have quoted in respect of Dennison, and never in a manner likely to attract support for the candidate, the advertisement concluded with the words “On New Year’s Day get out early and vote to keep your right to vote.”

It is to be noted that each plaintiff, in his statement of claim, set forth the advertisement in its entirety as a libel upon him, including the statements that were made specifically with respect to other candidates, and under their names. There are pleaded also certain innuendoes, which vary somewhat in the case of the different plaintiffs. It is not necessary, for the present purpose, to set them forth.

The defendants all pleaded qualified privilege, and in support thereof they made certain allegations of the circumstances under which the words complained of were published. The defendants Montagu Alfred Sanderson and Reliable Exterminators, Limited, who joined in the same statement of defence, set forth the circumstances as pleaded by it in the following paragraph:

“(3) The Defendants say that if the words as alleged were published in the Globe and Mail, such words were published under the following circumstances; the said words were published in

connection with the annual 1944 municipal elections in and for the City of Toronto at which the Plaintiffs and certain others mentioned in the words complained of sought election to public office in the said City as members of and with the support of the political party in Canada known as the Co-operative Commonwealth Federation; the Plaintiffs and such others had by advertisements in the public press and other media and by radio broadcasts, held themselves out as being fit and proper persons for public office for the said City by reason amongst others of their membership in and adherence to the political faith of the said Political Party and the words complained of were published in relation to the candidature of the Plaintiffs and such others for public office as members of the said Political Party, the activities of which party in seeking power in the municipal elections throughout the Province of Ontario, were the subject of discussion and comment in the public press. By reason of the said circumstances it was therefore the privilege and duty of all public spirited men and bodies to discuss freely in the press information and communications with respect to the candidature of the Plaintiffs and such others, and in the interest of the public to receive such information and communications in order to arrive at some conclusion as to the standing of the said candidates, the Plaintiffs herein, and their fitness for the position to which they aspired."

The defendants Globe Printing Company and C. George McCullagh, who joined in another statement of defence, pleaded as follows:

"(3) These Defendants say that the words complained of were published under the following circumstances: the said words were published at the time of the annual municipal elections for the City of Toronto in which the Plaintiffs and others mentioned in the words complained of sought election to public office in the said City as members of and with the support of the political party in Canada known as the Co-operative Commonwealth Federation: the Plaintiffs and such others had by advertisements in the public press and other media and by radio broadcasts held themselves out as being fit and proper persons for public office for the said City by reason amongst others of their membership in and adherence to the political faith of the said political party and the words complained of had relation to the candidature of the said Plaintiffs and such others for public

office as members of such political party the activities of which party in seeking power in municipal elections throughout Canada was the subject of discussion and comment in the public press."

At the trial the learned trial judge ruled that the advertisement alleged to be a libel upon the appellants was capable of a defamatory meaning. He ruled further that it was published on a privileged occasion. He left it to the jury to say whether in fact there was a libel or no libel. He further left to the jury the question of malice and the awarding of damages, if any. The jury gave a general verdict, in all the cases, as it was entitled to do under s. 4 of The Libel and Slander Act, R.S.O. 1937, c. 113. That section is as follows:

"4. On the trial of an action for libel the jury may give a general verdict upon the whole matter in issue in the action, and shall not be required or directed to find for the plaintiff, merely on proof of publication by the defendant of the alleged libel, and of the sense ascribed to it in the action; but the court shall, according to its discretion, give its opinion and directions to the jury on the matter in issue as in other cases, and the jury may on such issue find a special verdict, if they think fit so to do, and the proceedings after verdict, whether general or special, shall be the same as in other cases."

I have already stated that the jury found against fourteen of the plaintiffs and found in favour of two, but fixed the damages in each of these two cases at one cent each. It was suggested in argument that the ground of distinction that the jury found in these two cases, as distinguished from the fourteen cases where they found for the defendants, must have been that in respect of them the advertisement said that these two were communists. As to one of them, Eva Sanderson, it was said, "Mrs. Sanderson is entered as a C.C.F. candidate although she has been a known Communist since 1941 and is supported by the 'Canadian Tribune'—the Communist rag." As to the second, Grube, nothing is said as to his being a Communist in the comments made under his name, in the advertisement, but it is said of him that he is "one of the 'big shots' in the Communist Party" in the last paragraph of that section that I have already quoted from the advertisement as appearing under the name of William Dennison. Whether this was the true ground of distinction upon which the jury proceeded, it is not possible to say with any

certainty. The distinction would be a very fine one in some cases.

None of the plaintiffs was called as a witness, and no attempt to prove special damages was made in the case of any of them. All the plaintiffs failed of election.

The fourteen plaintiffs whose actions were dismissed complain both of misdirection of the jury by the trial judge, and that the verdict was perverse, and they ask a new trial. The two plaintiffs who succeeded, but only for small damages, likewise complain of misdirection of the jury by the trial judge, and allege that in the assessment of damages the jury was perverse.

I think it will be useful to consider first the appeal of these two successful plaintiffs. The matters in respect of which they allege misdirection or error by the trial judge are that he erred in law in ruling that the matter complained of was published on an occasion of qualified privilege; that he misdirected the jury by telling them as a matter of law that the occasion of the publication of the article complained of was a privileged occasion, and that the defendant Sanderson had a moral or social obligation to publish the material complained of; that he should have directed the jury that the words complained of imputed criminal, dishonourable and hypocritical conduct to the plaintiffs, and were clearly defamatory, and that the jury, although the matter was for their decision, ought so to find. There are two other grounds of complaint stated, and I shall refer to them later.

The jury, having found libel in the case of these two plaintiffs, must be taken to have found that the subject matter published of them was defamatory in fact, and that there was express malice, if they accepted the ruling of the trial judge that the occasion was privileged. That would seem to dispose of much that they complain of on this appeal, and to leave only such matters as more immediately concern the quantum of damages. Indeed, it is only the quantum of damages they ask to have reconsidered.

I fail to see in the charge of the learned trial judge anything in relation to the quantum of damages that was unfair or improper. It was plain upon the face of the pleadings that this whole matter was a by-product of a heated election campaign, in which party feeling was aroused. The fact that each plaintiff complained expressly in his statement of claim, as a libel upon

him, not only of what was published about himself, but also of what was said of each and every other candidate, and also of what was said of his political party and its policies or programme, so indicates. A jury is not necessarily perverse if it refuses to regard as seriously as the party assailed may do, the seemingly venomous attacks made upon such an occasion. No monetary loss is involved, and a jury is not likely to regard as serious the damage, if any, done by rough words applied to a political opponent, even though they may amount to gross abuse.

In my opinion we have, in the verdict of the jury in the cases of the two successful candidates, their assessment or estimate of the proper sum to be awarded in such a case to a plaintiff who, in their judgment, had established a good cause of action. I am not able to attribute the small amount of the damages to anything improper in the charge of the trial judge, or anything improperly omitted therefrom, nor to any failure on the part of the jury properly to discharge its functions. The jury are peculiarly the judges of the amount of damages to be awarded in a libel action: *Bray v. Ford*, [1896] A.C. 44; *Jones v. E. Hulton & Co.*, [1909] 2 K.B. 444 at 457 and 483; *Wilson v. London Free Press Printing Co.* (1918), 44 O.L.R. 12, 45 D.L.R. 503, and may take into account that there has been no real damage even in the case of a malicious libel: *Cooke v. Brogden and Co.* (1885), 1 T.L.R. 497 at 499.

The other grounds of appeal stated in the notice of appeal of these two plaintiffs, who complain of the assessment of damages, are, first, a complaint of the admission in evidence of extracts from the examinations for discovery of certain of the plaintiffs, and, secondly, that the learned trial judge failed to instruct the jury properly on the question of damages. As to the first, even if the admission of this evidence were objectionable, it was not, in my opinion, a matter that seriously affected the amount of damages awarded. As to the complaint of failure of the learned trial judge properly to instruct the jury on the question of damages, I cannot agree that he so failed to instruct the jury. In any event s. 27 of The Judicature Act, R.S.O. 1937, c. 100, provides that "A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence . . . unless some substantial wrong or miscarriage has been thereby occasioned." That has not been shown here.

I deal next with the appeals of the fourteen plaintiffs against whom a verdict was found. The jury having exercised its right to return a general verdict, it is impossible to say with assurance what findings they made on the specific questions propounded to them by the learned trial judge in his charge. It cannot be said whether they found no libel, or no malice, or merely no damages. It seems a safe assumption, however, that even if the jury had taken a view favourable to the plaintiffs on the question of libel or no libel, and also upon the question of malice, as they must be taken to have done in the other two cases, still they would, at the most, have found mere negligible damages. No special circumstances have been indicated in respect of any of these fourteen cases that would reasonably be assumed to put them upon a higher plane than the two cases in which only one cent was allowed as damages. The jury may have found grounds for rating them lower, and for refusing to allow even the minimum amount of one cent. I am not to be taken as expressing any opinion whatsoever as to what the jury should have done. The matter of damages is peculiarly for the jury in a libel action, and I have no right to substitute my own view for that of the jury.

Section 4 of The Libel and Slander Act expressly provides that the jury shall not be required or directed to find for the plaintiff merely on proof of publication by the defendant of the alleged libel, and of the sense ascribed to it in the action. Further, it is not the usual practice to order a new trial to enable a plaintiff to recover merely nominal damages: *Milligan v. Jamieson* (1902), 4 O.L.R. 650; *Scammell v. Clarke* (1894), 23 S.C.R. 307; *Simonds v. Chesley* (1891), 21 S.C.R. 174. I do not think these are cases in which, in the circumstances, we should exercise our discretion, in so far as it is a matter in our discretion, by granting a new trial. The appeals in these fourteen cases should, therefore, be dismissed.

I can see no ground upon which the defendants' appeals from the judgments entered against them in the cases of the two successful plaintiffs can be sustained. They should also be dismissed.

The cases with which I have dealt are, in my opinion, cases peculiarly suited to determination by a jury. The plaintiffs have brought their complaints into court, knowing that they must be placed before a jury for determination. In my opinion the

issues were clearly and fully placed before the jury by the learned trial judge, and the verdict should remain undisturbed.

All the appeals, therefore, will be dismissed, and as all parties have appealed there will be no costs of the appeals to any of them.

This appeal was heard before a Court of which our late brother Gillanders was a member, a short time before the onset of a critical stage of the illness that resulted in his lamented death on the 15th May 1946. The impossibility of issuing a judgment during his illness, when he was unable to participate in it, and the necessity for attending to the daily business of the Court, which has required the full time and attention of those members of the Court available for duty, have prevented the earlier delivery of this judgment.

HENDERSON J.A.:—I have had the privilege of reading the opinion of my Lord the Chief Justice and in it I concur.

LAIDLAW and ROACH JJ.A. agree with ROBERTSON C.J.O.

Appeals dismissed without costs.

Solicitors for the plaintiffs: Mason, Cameron & Brewin, Toronto.

Solicitors for the defendants Globe Printing Company and McCullagh: Macdonald & Macintosh, Toronto.

Solicitors for the defendants Reliable Exterminators, Limited and Sanderson: Cavell & Tanner, Toronto.

[COURT OF APPEAL.]

Rodd et al. v Western et al.

Mortgages—Actions—Limitation—Conveyance of Equity of Redemption—The Limitations Act, R.S.O. 1937, c. 118, s. 48(1)(k), as re-enacted by 1939, c. 25, s. 1(1)—The Mortgages Act, R.S.O. 1937, c. 155, s. 17a, as enacted by 1939, c. 28, s. 1.

Where a mortgagor and a second mortgagee joined in a quit claim deed of the mortgaged lands to the first mortgagee, *held*, the second mortgagee's right to sue the mortgagor upon the covenant in the mortgage was barred within ten years after default occurred under the mortgage, notwithstanding the subsequent execution of the quit claim deed.

Per HENDERSON and HOGG JJ.A.: Section 48(1)(k) of The Limitations Act, in its present form, was enacted at the same session of the Legislature as s. 17a of The Mortgages Act, and must be read with that section. It applied, therefore, only where the conveyance of the equity of redemption was made in such circumstances that the grantee was obligated to indemnify the mortgagor with respect to the mortgage, and the mortgagee had, consequently, a right of action against the grantee of the equity. Here the conveyance of the equity was clearly not of that kind, and consequently it did not affect the running of the period of limitation.

Per LAIDLAW J.A., *dissenting*: The provisions of s. 48(1)(k) of The Limitations Act, as re-enacted, were clear and unambiguous, and need not be read with any other statutory provision. Their effect clearly was that the cause of action here was not barred until ten years after the execution of the quit claim deed, which was undoubtedly a conveyance of the equity of redemption.

AN APPEAL by the defendants from the judgment of Grosch Co. Ct. J., in the County Court of the County of Essex. The facts are stated in the reasons for judgment.

4th June 1946. The appeal was heard by HENDERSON, LAIDLAW and HOGG JJ.A.

Norman L. Spencer, K.C., for the defendants, appellants: This action is statute-barred under the provisions of s. 48(1)(k) of The Limitations Act, R.S.O. 1937, c. 118, not having been commenced within ten years after the cause of action arose. The trial judge was wrong in finding that the re-enactment of s. 48(1)(k) by 1939, c. 25, s. 1(1), affected this case. The quit claim deed, which was executed first by the plaintiffs and then by the defendants, has prejudiced our defence. If the judgment stands, it means that an action upon the covenant would be barred by the lapse of ten years after the cause of action arose if a prior mortgagee had foreclosed, but would be kept alive if a quit claim deed, having no greater effect, were given instead.

The execution of a quit claim deed by the owners of the equity of redemption is not such a conveyance or transfer of their interest in the mortgaged lands as will keep alive the

mortgagee's right of action. This was not a conveyance or transfer in the ordinary sense, or as those words are used in the new s. 48(1) (k).

The plaintiffs, as second mortgagees, voluntarily parted with their interest in the property to the first mortgagee, and thereby rendered themselves unable to reconvey the mortgaged premises to the defendants, which defeats their right to recover in this action: *Kinnaird v. Trollope* (1888), 39 Ch. D. 636 at 644.

The cases which hold that a mortgagee may recover are all based upon the fact that the mortgagor has not been prejudiced. Here the defendants have definitely been prejudiced, and it does not seem reasonable that the quit claim deed, executed in the circumstances here present, should enure to the benefit of the mortgagee, as has been held by the trial judge.

G. LeRoy Rodd, for the plaintiffs, respondents: The 1939 amendment to s. 48(1) (k) created a new starting-point, and the giving of the quit claim deed was a conveyance within the meaning of that paragraph. There can be no other interpretation of the statute. As to the principles applicable in construing the statute, I refer to *Attorney-General v. Exeter Corporation*, [1911] 1 K.B. 1092; *Worthington v. Robbins and Cadigan* (1924), 56 O.L.R. 285, [1925] 2 D.L.R. 80; *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 at 549; *Ouellette v. Canadian Pacific Railway Company*, [1925] A.C. 569, [1925] 2 D.L.R. 677, 30 C.R.C. 207, 39 Que. K.B. 208, [1925] 2 W.W.R. 494; *Grand Trunk Pacific Railway Company et al. v. Dearborn*, 58 S.C.R. 315, [1919] 1 W.W.R. 1005, 47 D.L.R. 27. [HENDERSON J.A.: It is not the duty of the Court to legislate; the only point is whether the language of the statute is plain and unambiguous.] This is an action upon a covenant contained in a mortgage, and the persons being sued are the persons liable on the covenant. [LAIDLAW J.A.: Is the quit claim deed a conveyance within the meaning of the section?] The very wording of the deed is one of transfer and conveyance; there are clear words of transfer in it. The word "convey" should be construed as it is defined in The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152.

Section 48(1) (k) of The Limitations Act, as re-enacted, is unambiguous in itself, and recourse need not be had, in interpreting it, to s. 17a of The Mortgages Act, R.S.O. 1937, c. 155, as enacted by 1939, c. 28, s. 1.

As to the plaintiffs' inability to reconvey, I refer to Falconbridge on Mortgages, 3rd ed. 1942, p. 407, and *Beatty v. Bailey* (1912), 26 O.L.R. 145, 3 D.L.R. 831. Here it was the mortgagor's duty to pay off the first mortgage, and the loss of the land was occasioned by his default, and the first mortgagee's assertion of its rights.

Norman L. Spencer, K.C., in reply: *Beatty v. Bailey, supra*, was decided under a different statute, and is distinguishable from the case at bar. In the interpretation of statutes, the purpose of the legislature must be considered, if there is any possible ambiguity: 10 C.E.D. (Ont.), p. 220. The appellants' argument here involves a very wide construction of the words "transfer" and "convey".

Cur. adv. vult.

5th July 1946. HENDERSON J.A. agrees with HOGG J.A.

LAIDLAW J.A. (*dissenting*):—I have had the opportunity and benefit of reading the reasons for judgment of my brother Hogg, but with the utmost respect must dissent from the opinion expressed by him.

The language of para. *k* of s. 48(1) of The Limitations Act, R.S.O. 1937, c. 115, as re-enacted by s. 1(1) of c. 25 of the statutes of Ontario, 1939, is clear and unambiguous. It is unnecessary to resort to the language used in s. 17*a* of The Mortgages Act, R.S.O. 1937, c. 155, as enacted by 1939, c. 28, s. 1, to find the true meaning and intent of the legislation. On the contrary, the enactment should be given the effect which is to be gained from the plain meaning of the words used.

The action brought by the plaintiffs was "upon a covenant contained in an indenture of mortgage". The defendants conveyed or transferred their interest in the mortgaged lands by a quit claim deed dated the 26th September 1941. The action was commenced within ten years after that date, namely, on the 11th December 1943. The words "conveyed or transferred" plainly include the transaction in which the defendants executed as grantors a quit claim deed to the Toronto General Trusts Corporation—see The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 1(*a*).

I would accordingly dismiss the appeal with costs.

HOGG J.A.:—This is an appeal by the defendants from a judgment of His Honour Judge Grosch, in the County Court of the County of Essex, whereby it was adjudged that the plaintiffs recover against the defendants the sum of \$936 and costs, the amount due under the covenants for repayment in a mortgage dated the 15th February 1933, made by the defendants as mortgagors to the plaintiffs as mortgagees, given as security for the sum of \$417.80, with interest at 7 per cent. per annum, upon Lot 63 on the east side of Joseph Janisse Avenue in the city of Windsor.

By the terms of the mortgage, the principal sum became due at the expiration of a year from the date of the mortgage. It is agreed by all of the parties to the action that no payments on account of either principal or interest have been made. It was the intention of the parties to the mortgage that it should cover only Lot 62, and it is admitted by all parties that Lot 63 was included in the mortgage in error. The said Lot 62 was subject to a prior mortgage from one F. C. Parent, a former owner of the land, to one Joel H. Prescott, which mortgage was assigned to the Toronto General Trusts Corporation. On the 26th September 1941, the plaintiffs and the defendants executed, as grantors, a quit claim deed of Lots 62 and 63 to the Toronto General Trusts Corporation for the consideration of \$1, as expressed in the deed, but, as the evidence shows, for an actual consideration of \$50. This conveyance was registered on the 14th October 1941.

In their statement of defence to the plaintiffs' claim, the defendants plead that the mortgage to the plaintiffs was made in pursuance of The Short Forms of Mortgages Act, R.S.O. 1937, c. 160, and provided that in default of the payment of interest, the principal secured by the mortgage became payable, that interest became due and payable on the 15th August 1933, that default was made in the payment of this instalment of interest and that, therefore, a cause of action against the defendants then arose for the payment of all moneys secured by the mortgage. The defendants further plead that any action against them, based upon the covenant in the said mortgage, for the said moneys, is barred by the Statute of Limitations, as the action was not commenced until the 11th December 1943. A period of more than ten years had elapsed from the time when the mortgage money became due until the commencement of the action.

It is provided by s. 48(1) (*k*) of The Limitations Act, R.S.O. 1937, c. 118, that an action upon a covenant contained in an indenture of mortgage made on or after the 1st day of July 1894 is to be brought within ten years after the cause of action arose.

The learned trial judge held that he would have decided that the claim of the plaintiffs was barred by the Statute of Limitations, were it not for the terms of the amendment to s. 48(1) (*k*) of that statute, enacted by 1939 (Ont.), c. 25, s. 1(1), which provides for the time within which an action must be commenced under the circumstances to which reference is therein made. This paragraph reads:

“(k) an action upon a covenant contained in an indenture of mortgage or any other instrument made on or after the 1st day of July, 1894, to repay the whole or part of any moneys secured by a mortgage, within ten years after the cause of action arose or within ten years after the date upon which the person liable on the covenant conveyed or transferred his interest in the mortgaged lands, whichever is later in point of time.”

A further amendment reads:

“(kk) an action by a mortgagee against a grantee of the equity of redemption under section 17a of *The Mortgages Act*, within ten years after the cause of action arose.”

The trial judge held that the defendants, who were persons liable on the covenant to repay, had conveyed or transferred their interest in the mortgaged lands to The Toronto General Trusts Corporation by the quit claim deed of the 26th September 1941, to which reference has been made, and that the action having been commenced within ten years from the date of this conveyance, it was, therefore, not barred by the statute.

The grounds for appeal are that the action is barred by the Statute of Limitations, and, furthermore, that the plaintiffs conveyed the equity of redemption in the mortgaged premises to the first mortgagee by the quit claim deed in question and, as they thereby rendered themselves unable to reconvey their interest in the lands to the appellants, they have lost their right to repayment of the mortgage money under the covenant for repayment contained in the mortgage.

The 1939 amendments to The Limitations Act are, in the opinion of Mr. Falconbridge, as stated in his work on Mortgages, 3rd ed. 1942, at p. 538, consequent upon the enactment, by 1939,

c. 28, s. 1, of s. 17*a* of The Mortgages Act, R.S.O. 1937, c. 155. Both amending statutes were enacted at the same session of the Legislature, both received the royal assent and became law on the same day, and the new para. (*kk*) of s. 48(1) of The Limitations Act refers to s. 17*a* of The Mortgages Act. The latter section, by subs. 1, provides, *inter alia*, that where a mortgagor has conveyed the equity of redemption to a grantee under such circumstances that the grantee is obligated to indemnify the mortgagor with respect to the mortgage, the mortgagee shall have the right to recover from the grantee the amount of the mortgage debt in respect of which the grantee is obligated to indemnify the mortgagor.

Subs. 2 of the new s. 17*a* of The Mortgages Act provides that if the mortgagee recovers the amount of the mortgage debt against the original mortgagor, his right against the grantee shall cease, and so also the right against the mortgagor shall cease if the mortgage debt is recovered from the grantee. The mortgagee has a right of action against either. The action is on the covenant as against the mortgagor, but is brought into existence by the statute as against the grantee of the equity of redemption.

I think that the amendment to The Limitations Act, which refers to an action upon the covenant, applies to an action brought against the original mortgagor only where also there is a right of action against the grantee of the equity of redemption because the circumstances are such that the terms of the amendment to The Mortgages Act apply. In my opinion, the conveyance or transfer of the interest in the mortgaged lands by the person liable on the covenant in the mortgage, must be held to be a conveyance or transfer of such interest to a grantee of the equity of redemption who would, under s. 17*a* of The Mortgages Act, be obligated to indemnify the mortgagor with respect to the mortgage, and who would, therefore, be liable, because of the terms of the section, to an action by the mortgagee for the amount of the mortgage debt. In such case the action is to be brought within ten years of the date of the conveyance or transfer to a grantee of the interest of the person liable on the covenant. The conveyance of the equity of redemption to the Toronto General Trusts Corporation does not contain a covenant under which that Corporation shall indemnify the mortgagor, nor is it otherwise obligated to do so.

It is true that a cardinal rule of construction, in an endeavour to find the true intent and meaning of a statute, is that if its language is precise and unambiguous, it should be read in its natural and ordinary sense, but, as is stated in Maxwell on The Interpretation of Statutes, 8th ed. 1937, pp. 73-4:

"It is not infrequently necessary, therefore, to limit the effect of the words contained in an enactment (especially general words), and sometimes to depart, not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their wide primary or grammatical meaning actually express the real intention of the Legislature It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act. The general words of the Act are not to be so construed as to alter the previous policy of the law."

If the absolute literal meaning is given to the amendment in question, it then follows that although many years have elapsed beyond the ten years in which an action against the mortgagor might be brought, the mere fact of the mortgagor conveying his interest in the land to any person would immediately revive the right of action on the covenant against the said mortgagor.

In *The Canadian Pacific Railway Company v. The James Bay Railway Company (In re Branch Lines)* (1905), 36 S.C.R. 42, Nesbitt J. said at p. 89:

"The general rule which is applicable to the construction of all other documents is equally applicable to statutes and the interpreter should so far put himself in the position of those whose words he is interpreting as to be able to see what those words related to. He may call to his aid all those external or historical facts which are necessary for this purpose and which led to the enactment and for those he may consult contemporary or other authentic works and writings. This, however, does not

justify a departure from the plain reasonable meaning of the language of the Act. The best and surest mode of expounding an instrument is by construing its language with reference to the time when and circumstances under which it was made, and next to such method of exposition is the rule that if an Act be fairly susceptible of the construction put upon it by usage, the courts will not disturb that construction."

In *Clark v. Dockstader* (1905), 36 S.C.R. 622, Idington J. said, at p. 633, in a dissenting judgment in which the Mineral Act of British Columbia was under consideration:

"I think we must look at the curative proviso, and interpret it in the light of the history of the legislation in question and of the history of the judicial interpretation of such legislation, the probable wrongs such a proviso was intended to remedy and the measure of protection it probably was designed to give to honest discoverers, and adopt a result if we can that will not be fantastical."

In *Harrison v. Toronto Motor Car Limited and Krug*, [1945] O.R. 1, [1945] 1 D.L.R. 286, Gillanders J.A., in discussing the meaning of a certain section of The Highway Traffic Act, said at p. 12:

"Read literally, it might be argued that the subsection insulates the owner and driver from all liability for injuries to a person being carried in such motor vehicle, even if the injuries were done wilfully and by means other than the faulty operation of the motor vehicle. The more reasonable view is that the application is limited to the objects of the statute in which it is found. It should also be borne in mind that the legislature is presumed not to intend any substantial alteration in the law beyond the immediate scope and object of the statute under consideration."

I do not think that the "plain reasonable meaning of the language of the Act", to use the words of Nesbitt J. in *In re Branch Lines*, *supra*, can be said to be that a conveyance of the interest of the person liable on the covenant, in the mortgaged lands, referred to in the amended section of The Limitations Act, is a grant to a complete stranger having no interest in the mortgage or obligation to pay the moneys secured by it, in view of the amendment to The Mortgages Act enacted at the same time.

The draftsmanship of the amending clause to the Statute of Limitations might readily have expressed the intention of the Legislature beyond contention.

For the reasons given I have concluded that the action in question, not having been brought against the mortgagors within the time limited by s. 48(1) (*k*), is barred by that section, and that the appeal must be allowed and the action dismissed with costs of the action and of the appeal.

In view of my disposition of the matter, it is not necessary to give consideration to the further grounds of appeal advanced on behalf of the appellants.

Appeal allowed with costs, LAIDLAW J.A. dissenting.

Solicitors for the plaintiffs, respondents: Rodd, Wigle, White-side & Jasperson, Windsor.

Solicitor for the defendants, appellants: Norman L. Spencer, Windsor.

[LEBEL J.]

Booth et al. v. The City of St. Catharines et al.

Negligence—Dangerous Premises — Liability to Licensees — Occupier's Knowledge of Dangerous Condition—Collapse of Flagpole in Park, Caused by Boys Climbing.

A large number of persons gathered in a park, in response to a notice by the municipal authorities, to celebrate "V.J. Day". A display of fireworks was provided by the authorities, and several boys, for a better view, climbed up a flagpole which stood in the park. The park manager, earlier in the evening, had seen small children on the flagpole and had ordered them off. The weight of the bigger boys caused the flagpole to collapse, and several of the spectators were injured.

Held, the municipal authorities were liable. Even if the boys were trespassers, the defendants would be liable for their acts, if those acts were those of persons in a state of excusable ignorance, who were not fully responsible, and whose lack of responsibility should have been foreseen. *Weld-Blundell v. Stephens*, [1920] A.C. 956 at 985; *Illidge v. Goodwin* (1831), 5 C. & P. 190; *Lynch v. Nurdin* (1841), 1 Q.B. 29, applied. It was unnecessary to decide whether the injured persons were invitees or merely licensees, and, if they were licensees, whether the defendants' liability extended to dangers of which they ought to have known, as well as those of which they actually knew. *Ellis v. Fulham Borough Council*, [1938] 1 K.B. 212; *Richardson v. The City of Windsor*, [1942] O.R. 1; *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; *Robert Addie and Sons (Collieries), Limited v. Dumbreck*, [1929] A.C. 358; *Baker v. Mayor, etc. of Bethnal Green*, [1945] 1 All E.R. 135, discussed. Whatever the status of the injured persons, and the extent of the defendants' liability to them, the evidence showed that a real source of danger existed by reason of the boys' presence on the tower, that the park manager had actual knowledge of that danger, and that his failure to take any reasonable precaution for the protection of the people in the park was negligence for which his employers were liable. *Haynes v. Harwood*, [1935] 1 K.B. 146, quoted and applied. The evidence, on the other hand, justified a finding that this danger was not reasonably apparent to the persons injured and that even had they been fully aware of the boys' presence on the tower they would have been entitled to assume that they were permitted to be there, and that the tower was strong enough to bear their weight.

THREE ACTIONS for damages, tried together. The facts are fully stated in the reasons for judgment.

16th and 17th April 1946. The actions were tried by LEBEL J. without a jury at St. Catharines.

J. L. G. Keogh and C. W. Fullerton, for the plaintiffs.

F. J. Hughes, K.C., M. A. Seymour, K.C., and J. G. Edison, for the defendants.

10th August 1946. LEBEL J.:—The accident giving rise to these three damage actions, which were tried together by order of the Master of this Court, occurred in Montebello Park in the city of St. Catharines, about 8.50 o'clock on the evening of 15th August 1945. A large crowd of people had congregated in the

park to celebrate the victory of the allied powers over Japan, when a steel flagpole tower suddenly collapsed and fell. As a result, one Grace Ann McCormack was killed and the plaintiffs Arnold H. Bowler and Margaret Phyllis Booth were injured. The collapse of the tower was due to the fact that a number of boys, of varying ages, had climbed upon it as a point of vantage better to witness a display of fireworks. The experts agreed that the undue weight upon the tower, together with the movement of the boys, caused it to collapse. Two volleys of noise-making bombs, the first being fired at approximately 7.20 p.m. and the second at about 8 p.m., preceded a display of sky-rockets which were first set off about twenty minutes before the fall of the tower. Both the noise-making bombs and the rockets were fired from retorts or mortars erected in a rose garden which had been temporarily fenced by, or under the direction of, Herbert L. Gray, the park manager. This fence was about 1,000 feet in length and at the nearest point it was situate about 25 feet from the flag tower. Eight men were patrolling the inner side of the fence to keep people away from the mortars and two others were engaged in firing the rockets. Mr. Gray was present in the rose garden and the men took their orders from him. Mr. Gray in turn was acting upon express instructions from the mayor of the defendant municipality.

The flag tower had been constructed and erected in 1907 in another location, but it was moved to and re-erected in Montebello Park in 1916. According to the sketch put in as ex. 19, it was 70 feet high and it supported a 20-foot flagpole on top. It was rectangular in shape, tapering upwards, and stood on four posts bolted to steel angles embedded in concrete. There was no horizontal but there was diagonal bracing, and there were horizontal struts about 5 feet apart. The bottom strut was about 7 feet from the ground, but the diagonal bracing members came to within 18 inches of the ground.

About 7.20 p.m. Mr. Gray had his attention called by one of his men to the fact that two or three children were on the tower. He went to within 25 feet of the structure and told them to get down. They did so immediately. Precisely the same thing happened again just before 8 p.m. On each occasion Mr. Gray said that the children were on the first horizontal strut or climbing on to it. He put their ages at from four to six years. From that time on and until the tower collapsed at about 8.50

p.m. he paid no further attention to the tower. He testified that he had warned the children off lest they fall and hurt themselves. He said that it had not occurred to him that the children might damage the tower or cause it to fall. In the 23 years of his engagement in Montebello Park he swore that he had never had any trouble with boys climbing the tower. I assume he meant, although he was not asked specifically, that he had not seen children on the tower before.

The witnesses called did not all agree upon the number or ages of boys they saw on the tower before it collapsed, which is not surprising. Some said there were as many as twenty, and others testified that there were as few as four or five, but I am satisfied on the evidence that there were more than ten, and that their ages varied from ten to sixteen years. Harold Bradshaw, who was in the park at the time, put the number on the tower at about fifteen before they were joined by the five or six sea cadets at the last. He estimated the ages of the sea cadets at between seventeen and nineteen years. Most of the boys were on the lower struts of the tower, some were higher, and one had climbed as high as 35 or 40 feet from the ground. Two of the boys who were on the tower—one was fifteen, the other sixteen years of age—testified that it was shaking and swaying back and forth before it collapsed. There was evidence to the effect that the boys leaned backwards better to follow the course of rockets through the sky, and thus caused or contributed to the swaying of the tower. It was clearly established that, with the exception of the sea cadets, most of the boys were on the tower from 10 to 15 minutes before it fell.

Under date of 11th August, the mayor of the defendant municipality caused a notice to be inserted in the daily newspaper published in St. Catharines, which read in part as follows:

"To the Citizens of St. Catharines:

"In accordance with arrangements being made by the Special Committee, appointed to arrange a suitable programme for the observance of 'Victory-over-Japan Day', I hereby request the people of this City to observe and co-operate in the following programme. . . .

"On the day peace is declared, a Memorial Service will be held on the City Hall Lawn, commencing at seven o'clock in the evening. Military Units will parade from the Armouries to this service. Following the service there will be a general parade

(with civilian section forming on the Market Grounds) to Montebello Park by way of Church Street, to Court Street, to St. Paul Street, to Ontario Street, to the Park. At the Park there will be band concerts, dancing and other entertainment, concluding with a fireworks display.

"The public is asked for its co-operation and assistance in this programme, details of which will be announced through the local press and radio, so that the day will be observed in a fitting manner, in keeping with both victory and sacrifice."

The defendant The Board of Park Management of the City of St. Catharines is a corporation existing under the provisions of The Public Parks Act, R.S.O. 1937, c. 285, s. 4, and by virtue of By-law no. 3451 of the defendant The Corporation of the City of St. Catharines, and is the statutory agent, and, in the circumstances, the agent in fact, of the said municipal corporation.

The plaintiffs claimed that the flag tower was constructed "in a faulty, defective and weak condition", but the facts of the case do not substantiate this allegation. It was designed as a flagpole tower, and as such could have stood indefinitely, according to the experts, and I so find. Furthermore, in my opinion, nothing in the evidence makes applicable either the doctrine in *Rylands et al. v. Fletcher* (1868), L.R. 3 H.L. 330, or the rule of *res ipsa loquitur*, as plaintiffs' counsel contended. But the plaintiffs claimed that the defendants "knew or ought to have known that children were climbing and playing on the flagpole and took no steps or adequate steps to prevent them so doing; that they failed to warn children away from and to put children off the flagpole which they knew or ought to have known was an allurements to such children; they ought to have erected a fence or barricade around the flagpole; and they ought to have stationed a policeman on guard at the flagpole to prevent children climbing and playing thereon".

The defendants denied that any of such omissions, if proved, amounted to negligence, and alleged, *inter alia*, that the tower, at the time it collapsed, was not under their regulation or control, but that "it was occupied and under the regulation and control of trespassers and mischief makers".

Many of the cases cited by counsel in support of their arguments had to do with the duty owed by an occupier to children who had come upon his premises and were injured by reason of defects therein or happenings thereon. Such cases are of little, if

any, assistance in the case at bar, because what the Court is now concerned with is the duty, if any, owed by the defendants to the persons who were struck by the falling tower, and not to the boys upon the tower, who, fortunately, were uninjured by its fall.

It is unnecessary to determine whether the boys were trespassers when they climbed the tower, as Mr. Hughes contended, because if their conduct is treated as *novus actus interveniens*, in my opinion, the defendants would be liable, depending upon the duty they owed the plaintiffs, if the *novus actus* was the act of children or persons in a state of excusable ignorance, who were not fully responsible and whose lack of responsibility should have been foreseen: see Salmond on Torts, 10th ed. 1945, p. 146, and *Weld-Blundell v. Stephens*, [1920] A.C. 956 at 985, *per* Lord Sumner, and the cases referred to by him with respect to the special duties of care owed where dangerous things or things capable of being dangerous are left exposed to the interference of others, *viz.*, *Illidge v. Goodwin* (1831), 5 C. & P. 190, 172 E.R. 934 and *Lynch v. Nurdin* (1841), 1 Q.B. 29, 113 E.R. 1041.

As I have indicated, the question here is the nature of the duty owed by the defendants to the injured persons in the circumstances. Mr. Hughes urged the view that they were licensees; he relied chiefly on the decisions in *Ellis v. Fulham Borough Council*, [1938] 1 K.B. 212 and *Richardson v. The City of Windsor*, [1942] O.R. 1, [1942] 1 D.L.R. 500, which had to do with persons injured in public parks. And he contended that since they were licensees, the defendants would not be liable for damages resulting from danger of which they merely ought to have known, as would be the case if the injured persons had been invitees.

This latter contention is counter to the dicta of three eminent judges. In *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74, Lord Atkinson, at p. 86, said: "The plaintiff, being only a licensee, was therefore bound to take the stairs as she found them, but the landlord was on his side bound not to expose her, without warning, to a hidden peril, of the existence of which he knew, *or ought to have known*." And Lord Wrenbury, at p. 96, remarked: "If there is some danger of which the owner has knowledge, *or ought to have knowledge*, and which is not known to the licensee or obvious to the licensee using

reasonable care, the owner owes a duty to the licensee to inform him of it.” (The italics are mine) And the same view of the measure of duty to a licensee was stated by Lord Hailsham in *Robert Addie and Sons (Collieries), Limited v. Dumbreck*, [1929] A.C. 358 at 365.

In support of his contention, Mr. Hughes referred me to the passage from the judgment of Greer L.J. in *Ellis v. Fulham Borough Council*, *supra*, at p. 221, where the learned judge treated Lord Hailsham’s dicta as though his words, “or ought to be known” should be eliminated.

Mr. Keogh relied strongly on the notice in the public press, which I have set out in part. He argued that it was an invitation of an especial nature constituting the injured persons invitees, but that in any event, if these persons were licensees the words “ought to be known” should be retained.

It may well be, in view of the public notice and other factors, which I have not mentioned, that the present case is to be distinguished from such cases as *Ellis v. Fulham Borough Council* and *Richardson v. The City of Windsor*, *supra*, and that the injured persons were invitees rather than licensees (see Lord Greene’s remarks in *Baker v. Mayor, etc. of Bethnal Green*, [1945] 1 All E.R. 135); and also that the proper test of liability to a licensee is as Mr. Hughes contends. The law upon both points seems to me to be very much unsettled. But I do not think it necessary to express any concluded opinion upon either question because I will assume that the legal relationship between the injured persons and the defendants was that of licensor and licensee.

Lord Greene M.R., in *Baker v. Mayor, etc. of Bethnal Green*, *supra* at p. 140, said:

“The obligation of a licensor is well known, although the language in which it has been expressed in some cases had led to comment. Avoiding controversial matters, it may be stated as follows: A licensee must take the premises as he finds them, subject to this important qualification, that, if the licensor knows of a danger which is not apparent, or would not reasonably be apparent to the licensee, it is his duty to take steps to protect the licensee against it. What the suitable steps may be must, of course, depend upon the circumstances of the case.”

I am convinced that a real source of danger existed by reason of the boys’ presence on the tower, and I find as a fact that Mr. Gray had notice of the danger. Many thousands of people of all

ages were expected to join in the celebration and the flag tower was situate but a very short distance from the place in the rose garden where the fireworks were to be set off. What was more natural in the circumstances than that boys or even thoughtless adults would use the tower as a point of vantage from which to witness the display? That is what actually happened, and it was not sufficient to order two groups of children away, especially when the probability was that different groups would be attracted to it. And had Mr. Gray not acknowledged his apprehension on both occasions when he had been told that there were boys on the tower by ordering them down? I cannot bring myself to the view that he spoke the whole truth when he said his concern was merely for the safety of the boys themselves. While he professed to no good reason for concern for the safety of the persons around the tower, he was aware of the age of the structure and well knew the purpose for which it existed. He understood that it was not meant to bear the weight of any person, much less the weight of a group of boys, regardless of their ages, for when the rope attached to the flag had broken on occasions he had seen that no person was allowed to climb up the tower to repair it. Instead, an extension ladder belonging to the municipal corporation's fire department had been used, and the ladder was always kept clear of the tower. This fact alone establishes that Mr. Gray knew of the danger created by weight upon the tower.

I also find as a fact that Mr. Gray's failure to take any reasonable precaution whatever for the protection of the people in the park was negligence for which the defendants are liable. He could very readily have spared someone to act as a guard who could have warned the crowd back if he found it impossible to keep the boys off the tower. Incidentally, there was no evidence to show that the boys would have disobeyed anyone in authority. The only evidence on the point is to the contrary. Mr. Gray should have done that much, in my opinion, at the very least, and at the last, if he failed to realize until then that the boys were climbing upon the tower; it is idle to suggest, as it was argued, that there was nothing he could have done since he had insufficient time to cause a temporary fence to be erected around the tower after he had been informed that boys were climbing on it. To ignore the danger created by notice that boys were attracted to the tower, and to go ahead with the fireworks

display, without at least posting a guard near the tower, was inexcusable in the circumstances.

"It is not necessary to show that this accident and this particular damage was probable; it is sufficient if the accident is of a class that might be anticipated as one of the reasonable and probable results of the wrongful act.": *per* Greer L.J. in *Haynes v. Harwood*, [1935] 1 K.B. 146 at 156.

It should also be mentioned that the times at which the boys were seen upon the tower by Mr. Gray coincided fairly well with the times at which the two volleys of noise-making bombs were fired. If boys had not been seen upon the tower before, as Mr. Gray seemed to say, what conclusion could any reasonable person reach other than that the boys were attracted to the structure by the display? Furthermore, I am unable to yield to Mr. Hughes' argument that notice of the presence of small boys was not notice of the likelihood of larger boys or even thoughtless adolescents being on the tower. It is well known that the presence of even one boy upon such a structure will attract others, regardless of age; and it seems to be the rule, speaking generally, that the older the boy the more chances he will take.

It remains only to be considered whether the danger created by the presence of the boys on the tower constituted such a danger as was not apparent or would not reasonably be apparent to the injured persons. The plaintiff Margaret Phyllis Booth and her husband testified that they had seen the boys on the tower before they had taken up positions near the tower. Mrs. Booth made it plain to me that, though she knew for a period of perhaps ten minutes that the boys were on the tower, she had not been paying much heed to them, and that her attention was upon the fireworks, and I so find. Her husband said that he had seen the boys on the tower but their presence there had not concerned or alarmed him. Mr. Bowler swore that he had seen the boys on the tower from Queen Street—a distance of about 100 feet away—and that he entered the park and proceeded to a place near the pole to witness the fireworks. Only three minutes elapsed from the time he first saw the boys until he heard someone cry out that the pole was falling. He could not get out of the way, because of the congestion of people, before the tower fell and injured him. I am satisfied that Mr. Bowler also paid little or no attention to the boys on the tower. He said he had merely glanced at them. It is impossible, of course, to say

what the deceased Miss McCormack witnessed before the tower fell, but she had been present with Miss Dorothy Candler, who testified. Miss Candler swore that she and Miss McCormack were in the act of passing the pole when it fell. She had seen some boys on the pole a few seconds before, but their outline was blurred and she seems to have seen little else. In the circumstances mentioned I must find that the facts constituting the existing danger were not reasonably apparent to the persons injured. Moreover, I am satisfied that had these persons been fully aware of the presence of the boys upon the tower they would have been entitled to assume that they were permitted to be there, and that the tower was strong enough to bear their weight; hence that there was no real danger. It is true that two of the witnesses said they were alarmed at seeing the boys upon the tower, and that one testified that he had called to them to get down as he feared an accident, but the other witnesses who were present had manifested no alarm, and it is common knowledge that all persons in a crowd cannot be expected to act according to pattern, and that a dangerous situation sensed by one will not be sensed by all. In any event, there was nothing in the evidence to indicate that the injured persons were aware of any danger before the collapse of the tower. Their attention was invited, and intentionally invited, by the defendants to the fireworks display. In the result, in my view, the defendants are liable to the plaintiffs.

I think I should not leave the present case without referring to *Shiffman v. Venerable Order of St. John of Jerusalem*, [1936] 1 All E.R. 557. The court was there likewise concerned with a falling flagpole in a public park, and while it is unwise to place reliance upon another decision which rests for its authority on somewhat different facts, the case is of interest. In that case liability was found against the defendant who erected a flagpole and failed to guard it sufficiently from interference by children. It is true that the Court also found in that case that the flagpole was erected in such a way as to be unsafe, but I think that such a finding is unnecessary in the case at bar, because even if the structure with which I am now concerned was fit for the purpose for which it was designed, as I have found, it was not being used solely for that purpose at the time of its collapse.

The plaintiff Margaret Phyllis Booth was 27 years of age at the time of the accident and she was then in reasonably good

health. Her injuries consisted of a dislocation of the left hip, a comminuted fracture of the left collar-bone, and a transverse fracture of the shoulder-blade. She also sustained extensive damage to the soft parts underneath the collar-bone and shoulder-blade, which caused a paralysis of the left arm and an atrophy of the muscles of the left hand. The paralysis and the atrophy were due to the injury to the nerves in the soft parts mentioned. The paralysis has disappeared but the atrophy is permanent to a certain extent, and undoubtedly she will be handicapped by loss of a proper functioning of the left hand for the remainder of her life. She also suffered profoundly from shock, and she endured much pain and suffering.

By reason of his wife's injury, hospitalization over a period of seven and a half weeks and rather long convalescence, the plaintiff Stanley Booth was put to heavy expense, and he was forced to absent himself from work for a time. He also suffered some loss of his wife's society, *consortium* and services.

The plaintiff Arnold H. Bowler sustained a fractured left wrist and some injury to his left leg above the ankle, but I am satisfied that he is not disabled permanently as a result of either injury. His claim that he was unable to do even light manual labour from the date of the accident until the time of the trial is due, in my opinion, to a neurosis which will soon disappear, rather than to any real physical trouble. He did not impress me as a malingerer, and I think his claim for loss of wages, as well as the expense he necessarily incurred, should be allowed.

The deceased Grace Ann McCormack was eighteen years of age at the date of the accident and unmarried. She left her surviving the plaintiff Willard J. McCormack, her father, her mother, one infant brother, and two infant sisters. The father was 48 years of age and earned about \$25 or \$30 per week for the support of the family. The deceased was the oldest child and she had always lived with the family. Prior to the date of the accident, she had been employed in a rug mill and had earned approximately \$17.66 per week. Her mother testified that from time to time she had given her a dollar or two extra, in addition to her board, and she also helped her mother with the housework. There was evidence to the effect that she had no immediate matrimonial prospects. I am satisfied, in these circumstances, that there was a probability of some pecuniary benefit, which the deceased's parents might reasonably have expected to enjoy

had she not been killed. I assess the damages of the plaintiffs as follows:—

Margaret Phyllis Booth, \$4,500.00.

Stanley Booth (including \$500 for loss of *consortium*, etc.) \$2,364.25.

Arnold H. Bowler (including \$1,260.47 for loss of wages and out-of-pocket expenses), \$2,500.00.

Willard J. McCormack (including funeral expenses), \$1,000.00.

The plaintiffs are entitled to their costs, but in accordance with the principle stated by the Honourable Mr. Justice Urquhart in *Bowers et al. v. J. Hollinger & Co. Limited, et al.*, [1946] O.R. 526 at 543, they are entitled to but one set of costs throughout.

Judgment accordingly.

Solicitors for the plaintiffs: Bench, Keogh, Rogers and Grass, St. Catharines.

Solicitor for the defendants: M. A. Seymour, City Solicitor, St. Catharines.

[McRUER C.J.H.C.]

Gray v. Yellowknife Gold Mines Limited and Bear Exploration and Radium Limited.

(No. 2)

Companies—Directors—Duties and Liabilities—Breach of Fiduciary Relationship towards Shareholders—Setting Aside of Consequent Transactions—Companies with Common Directors.

While the precise relationship of directors to a company has not been defined by the courts, there is abundant authority for holding that it is a fiduciary one. *Regal (Hastings) Limited v. Gulliver et al.*, [1942] 1 All E.R. 378, referred to. Where the common directors of two companies, in bad faith, take advantage of their fiduciary position to promote the interests of one of the companies, in which they are, or are about to become, substantial shareholders, to the detriment of the other company and its shareholders, their acts will be set aside. *Nocton v. Lord Ashburton*, [1914] A.C. 932 at 954, and other authorities, applied.

AN ACTION to set aside certain transactions between the defendant companies. The facts, and the relief sought, are fully stated in the reasons for judgment.

12th, 13th, 14th, 15th, 20th and 21st February and 13th, 14th and 19th June 1944. The action was tried by McRUER C.J.H.C. without a jury at Toronto.

J. W. Pickup, K.C., and *W. B. Williston*, for the plaintiff.

G. R. Munnoch, K.C., for the defendant Yellowknife Gold Mines Limited.

A. G. Slaght, K.C., *W. E. McLean, K.C.*, and *W. H. G. Boyd*, for the defendant Bear Exploration and Radium Limited.

24th August 1946. McRUER C.J.H.C.:—The plaintiff Gray sues personally and on behalf of himself and all other shareholders of Yellowknife Gold Mines Limited other than Bear Exploration and Radium Limited and the four persons named, who are common directors of Yellowknife Gold Mines Limited and Bear Exploration and Radium Limited.

For the purpose of convenience, I shall refer to the respective defendants as “the Yellowknife Company” and “the Bear Company”.

The plaintiff claims a declaration that the issue of a certain 700,000 shares of the Yellowknife Company is null and void and an order setting the same aside; a declaration that a certain alleged option dated 4th July 1936, purported to be extended, or renewed, on the 27th July 1943 and further extended, or renewed, on the 9th July 1945, is null and void, and an order vacating and

setting the same aside; an injunction restraining the defendants, and their directors, servants and agents, from allotting or issuing any further shares of the Yellowknife Company under the said alleged option; and an injunction restraining the Bear Company, its directors, officers, servants or agents, from voting the said 700,000 shares of the Yellowknife Company at any meeting of the shareholders of the said company, or further assigning, transferring or otherwise dealing with the said 700,000 shares.

In disposing of this matter, it is important to consider the facts in their chronological sequence and appreciate the conditions surrounding the development of the affairs of the defendant companies and those associated with them.

In 1933 the plaintiff acted as solicitor for one Wright, who was, at that time, a man prominent in the mining world of Ontario and a large shareholder of the Bear Company. In 1934, while acting as solicitor for the Bear Company, the plaintiff incorporated the Yellowknife Company, of which the Bear Company became a large shareholder. Immediately after its incorporation, the plaintiff was elected to the board of directors and became a member of the board, which purported to consist of five directors. The constitution of the board of the Yellowknife Company throughout the relevant period has been attacked on the ground that there never was a valid board of directors. In the view I have taken in this case, it is not necessary for me to deal with the respective arguments advanced on this point.

For a short time in the year 1935 the plaintiff had no connection with either of the defendant companies. Towards the end of that year, he took over the interest of Wright in the Bear Company, and in the year 1936 he became actively interested in both the Yellowknife and the Bear Companies.

At that time, of the 1,562,207 issued shares of the capital stock of the Yellowknife Company, the Bear Company held 1,370,000 shares; while the Yellowknife Company held 1,398,000 shares of the issued capital stock, amounting to 1,818,305 shares, of a company known as the Burwash Yellowknife Company Limited, which I shall refer to as "the Burwash Company".

At this time, there appeared to be little or no public interest or confidence in any of these associated companies.

In July 1937 the Burwash Company transferred certain properties to a newly-incorporated company known as Giant

Yellowknife Gold Mines Limited, which I shall hereafter refer to as "the Giant Company". In return, of 1,200,000 vendor's shares, the Burwash Company received 810,000, and the Bear Company 300,000, and 90,000 went to stakers. Later on, the Burwash Company transferred 20,000 shares of the Giant Company to Consolidated Smelters Limited in settlement of a claim, leaving 790,000 Giant shares in the portfolio of the Burwash Company. The Bear Company subsequently parted with 100,000 of its shares, leaving it holding 200,000 shares of the Giant Company. For the purpose of convenience, and probably to save fees, the licences of all the associated companies were held by the Bear Company.

The plaintiff Gray has given in evidence the circumstances under which the option on all the remaining treasury shares of the Yellowknife Company, which is the subject matter of this action, was given to the Bear Company in 1936.

I have no hesitation in accepting Gray's evidence in respect of this matter, and in fact he impressed me, as he gave his evidence in the witness-box, as a witness who was endeavouring to give a fair and accurate account of the events concerning which he testified.

In July 1936 the whole enterprise was in a poor financial position. At this time Gray conceived the idea that he could raise money by selling Yellowknife shares. It was therefore arranged between the two companies, which had common directors and were under the common management and direction of Gray, that the Yellowknife Company should give the Bear Company an option on all its remaining unissued treasury shares, amounting to 1,437,793 at 30c. per share, and that the shares should be sold by the Bear Company. An agreement, dated the 4th July 1936, was drawn up and signed, a copy of which appears in the minute-books of the respective companies.

While the agreement recites that the Bear Company has agreed to finance and direct the development of the Yellowknife River holdings of the optionor, the Bear Company does not, by the terms of the agreement, bind itself to render any services to the Yellowknife Company. The agreement also provides that the option is an option only, and that the optionee shall not be bound to make any payments or by making any previous payments, and that the agreement shall be terminated, provided the optionor gives ten days' notice of termination by letter

addressed to the optionee, at the address set out therein. The agreement is signed by Gray and one Taylor on behalf of each of the respective companies and was ratified at a meeting of the directors of the Yellowknife Company at which the minutes show that Gray, Taylor and one Robson were present, and at a meeting of the directors of the Bear Company at which the same parties are shown to have been the directors present. It is not under seal, but nothing turns on this point; although raised in the pleadings, it was not urged by counsel in the argument.

Gray says that the matter never proceeded further, and while they tried to sell Bear Shares owned by Gray, with which to provide funds for the companies, in the summer of 1936, this came to an end in September when the stock was delisted on the stock exchange. He says they never got started selling Yellowknife stock because they did not get any money to go ahead, and that they were badly in need of money, and in October the Securities Commission was preventing any campaign to sell Bear Company stock, and they just dropped the whole idea of trying to sell Yellowknife stock.

He says that there was no agreement on the part of the Bear Company to finance the Yellowknife Company, and any moneys supplied by the Bear Company were provided by himself. The only thing that was done on the Yellowknife prospects after July 1936 was to finish up what had been contracted for, and that was in respect of some work on the Giant properties. There was no further work done on the Yellowknife claims from then until 1938, when another group became interested in the properties, to which I shall refer as "the Keachie group".

On this evidence, which I accept, I cannot come to any other conclusion than that this option was given as part of a plan that Gray had in mind of financing the associated companies when they were in financial extremities, and, as far as the companies were concerned, the whole scheme was abandoned, including the option.

In 1938, the Bear Company was, on the evidence of Mr. Keachie, on the verge of bankruptcy. At this time Gray interested one Wehrhan in the enterprise, and he agreed to become financially interested, but insisted that his nominees should constitute the board of directors. On the 28th July 1938 a new board of directors of the Bear Company was elected, and on the 31st May 1938 the new board took over the affairs of

the Yellowknife Company. The directors of the Bear Company consisted of Messrs. Lee, Jaeger, Keachie, Rowand and Johnson, and the directors of the Yellowknife Company consisted of Messrs. Lee, Keachie, Johnson and Archibald.

Gray says that at this time the Bear Company owed him \$132,000 for moneys advanced for work done on properties owned by the associated companies. An agreement was made between the Bear Company and Gray, that he should accept shares in the Yellowknife Company owned by the Bear Company in the amount of 364,733 shares and give a release. The minutes of the Bear Company of the 28th July 1938 referred to this transaction. According to these minutes these shares were valued at 1c. a share, but were accepted by Gray, in discharge of the indebtedness to him, at 50c. a share. The shares were not transferred at that time, but a certificate for shares in this amount was handed over following subsequent litigation.

The minutes of the same meeting of the directors show that 250,000 shares of the Yellowknife Company were optioned to Yukon Yellowknife Developments Limited at 1c. per share. It is stated "that there was no market for the shares and the Yellowknife Company had no funds available with which to develop its mining claims and the price of 1c. per share, at the present time, was a fair price".

It does not appear that this option was taken up, and according to the minutes of the meeting of the directors of the Bear Company held on the 29th November 1938 there was also default on an option on the unissued capital stock of Giant Yellowknife Mines Limited, and the option had terminated and the board of directors of the company had resigned. Messrs. Lee, Keachie, Johnson and Forbes were elected directors of the Giant Company as representatives of the Bear and Burwash Companies.

At this meeting a discussion took place in reference to a plan whereby the Bear Company would acquire all the assets of the Burwash and Yellowknife Companies. On the 23rd December 1938 a plan to merge the Burwash Company with the Yellowknife Company was approved, and for this purpose the directors authorized the issue of 210,150 shares of the treasury stock of the Yellowknife Company to be distributed amongst the shareholders of the Burwash Company (other than the

Yellowknife Company) in the ratio of one share for each two shares held in the Burwash Company. These minutes contain the following paragraph:

"It was pointed out to the meeting that Bear Exploration and Radium Limited held an option to purchase the entire unissued capital of the Company at 30 cents per share. It was deemed necessary to obtain the consent of the Bear Exploration and Radium Limited to the proposed purchase which involved the issuing of additional shares. The President was instructed to arrange for such consent."

A formal document appears in the minutes under the corporate seals of the Bear Company and the Yellowknife Company. It is signed by Thomas F. Lee and L. F. Keachie, as president and secretary of each company. According to the terms of the document, consent is given to the sale by the Burwash Company of its entire assets and undertakings to the Yellowknife Company, and the issuing by the Yellowknife Company of shares of its capital stock in consideration of the transfer of the assets as set out in a certain agreement dated 23rd December 1938. It further provides that:

"Bear Exploration and Radium Limited hereby releases from its option to purchase sufficient shares of the said Yellowknife Gold Mines Limited to complete the purchase, in accordance with the terms of the said agreement.

"In consideration thereof Yellowknife Gold Mines Limited agrees that the said option as to the remaining unissued shares of its capital stock shall remain in full force and effect."

The Yellowknife minutes, authorizing the transaction, do not contain any reference to the last paragraph of the above quotation.

Three of the four directors of the Yellowknife Company present at the directors' meeting dealing with this matter were common to both companies at the time.

Mr. Johnson and Mr. Keachie were called as witnesses for the defence. I think the fair conclusion from their evidence is that, on taking over the affairs of these companies, they found appended to the minutes of the respective companies the memorandum of agreement dated 4th July 1936, and as far as they knew the option was still in effect. They made no inquiry from Mr. Gray or others associated with him in respect to the circum-

stances under which the option was given or the purposes for which it was given. Seeing it as a matter of record, they concluded that before issuing shares from the treasury of the Yellowknife Company to complete the Burwash deal, formal consent to the issue of the shares should be given by the Bear Company. Mr. Johnson's evidence in respect to it was as follows:

"Q. Did you have anything to do with ex. 23 in this action?

"A. I prepared this consent.

"Q. Why did you do that Mr. Johnson?

"A. Because in so far as I was concerned, when we came into the company there was an option existing in fact, and as far as I was concerned that option still existed, and I felt that we needed a consent from the optionee in order to part with any of the shares covered by the option."

Mr. Keachie's evidence was similar. Referring to the agreement of the 4th July 1936, he was asked:

"Q. Do you recall having seen that and considered that matter?

"A. I would, of course, be aware of it. I read the records quite carefully and was well aware of it. I cannot tell you the time. I do not remember the look of that document but I am sure I would be well aware of it.

"Q. Do you recall such —

"A. Yes, there was the option on the record both of this company and the other—both of this Bear Company and the Yellowknife Gold Mines. . . .

"Q. How did you treat that information that you found in the minute book?

"A. We treated it as a subsisting option. It was set out in the minutes of both companies as having been approved and entered into, and it was also referred to in the reports of the secretarial organization that had for a time apparently acted for Bear, and the records led us to believe that it was in full force and effect, and we so adopted it.

"Q. You had no other information?

"A. None whatever."

The matter of the legal position of the Yellowknife Company in regard to the option does not appear to have at any time come before the Yellowknife board for consideration during the time that this group of directors was in charge of the

affairs of the two companies. During this period moneys were advanced for the purpose of developing the holdings of the various associated companies, and a strict accounting was kept. All advances for the account of the Yellowknife Company were charged to that company in the books of the Bear Company and credited to the Bear Company in the books of the Yellowknife Company. Of the total issued capital stock of the Yellowknife Company, amounting to 1,562,207 shares, the Bear Company, on 30th November 1938, held 1,005,267 shares.

During the period that these companies were under the management of the Keachie group, the firm of Gunn, Roberts & Company were retained as auditors for the associated companies and prepared balance sheets which are attached to reports to the shareholders dated 22nd July 1938, 7th January 1939, 25th September 1939, 4th October 1940, 7th August 1943 and 9th February 1944, on each of which is a note stating that the balance of the unissued stock of the Yellowknife Company is under option to the Bear Company at 30c. a share. The reports do not indicate any change in the nature of this option in 1943. The auditors who prepared these statements were not called as witnesses, and it does not appear that the statements are founded on anything other than records found by the auditors in the books of the respective companies.

Mr. Gray says that he does not recall the Gunn-Roberts reports at all, that at the time he had nothing to do with the control of the company, and that he was completely on the outside. It may be that the report of 4th October 1940 may have come to his attention as he was a director at that time. There is no evidence that it did or was dealt with by the directors—in any case it only had reference to an option that might be cancelled by the Yellowknife Company on ten days' notice.

The minutes of a meeting of directors of the Bear Company held on the 28th September 1939 show that it had closed down its mining operations and that the Yellowknife Company was released from contributing to the head office expenses.

In September 1940 Mr. Keachie's group appears to have lost interest in the enterprise, and the control was again handed back to Gray and his associates, who, with the exception of one Wilson who represented the Imperial Oil Company, a large creditor, on the board, became the members of the board of directors of the two companies.

When the Yellowknife Company took over the Burwash Company, it became the owner of 709,000 shares of the Giant Company, which eventually proved to be an extremely valuable asset. From the time Gray came on the board in 1940 until he went off in 1943, no work was done on any of the Yellowknife properties except the Giant claims. Gray says that he borrowed money and paid the money over to the authorities to maintain the various Yellowknife claims. He says that he paid the money to the Bear Company and the Bear Company disbursed it to the Yellowknife Company.

In or about the month of February 1943, one Carl Pielsticker interested H. R. Swanson in the enterprise. At this time Mr. Swanson purchased some 60,000 shares of the Bear Company stock. He did not become a shareholder of the Yellowknife Company, other than holding one qualifying share. Mr. Swanson said that they were unfamiliar with handling mining companies and particularly from the point of view of operating, and also unfamiliar with the general practice with respect to the capital structure of these companies, and that they sought out Mr. G. B. Webster, who accepted their invitation to come on the board and clarify the financial relationship of the group of companies. Mr. Swanson says that when Mr. Pielsticker introduced him to the situation generally he brought with him a document showing the terms of the option of the 4th July 1936, and reports made by geologists on properties in Yellowknife and the claims held by Bear but owned by Yellowknife in the major part. He says that the fact that the Bear Company controlled the Yellowknife Company, which possessed the major portion of the other claims, and held an option on the remaining treasury shares of Yellowknife stock, was a very important consideration. He says that the 30-cent price at that time seemed high and he did not know there was a market for Yellowknife shares at that time for 5c. a share.

He says he thought buying into Bear would give him an interest ultimately of some 80 per cent. in the assets of the Yellowknife Company. He says he did not buy Giant shares as it was the same as the other properties with the exception of the Brock showing, which was a little more attractive. He also says that another reason for his great interest in the Bear Company was the fact that they had pending, and the directors had been working on, an arrangement with the Frobisher Com-

pany whereby they would come in and explore in detail the Giant properties. The Frobisher Company is an operating company controlled by Ventures Limited, a widely known and well regarded development company in Canada. He says they outlined their plans, which to him were comprehensive and in extreme difference from anything that had preceded on any of the properties that he could determine. He says that previously there had been a more or less hit-and-miss pattern.

On the 20th April 1943 Messrs. Jaeger, Swanson, Irwin, Admiral and Eddy were elected to the board of directors of the Bear Company. On the 27th May 1943 Messrs. Swanson, Irwin, Jaeger, Admiral and Wallace were elected to the board of directors of the Yellowknife Company. On the 28th May 1943 Mr. Wallace's resignation was accepted by the Yellowknife Company and Mr. F. C. Admiral was elected in his place. Mr. Swanson was elected president of the company, Mr. F. B. Irwin vice-president and Mr. Jaeger treasurer. At this meeting it was reported that Mr. Greenberg had been instrumental in negotiating for the sale of a portion of the treasury shares of the Giant Company to the Frobisher Exploration Company Limited, an affiliate of Ventures Limited. It was also pointed out that a meeting to elect directors of the Giant Company was called for 1st June, and a proxy was authorized.

A meeting of directors of the Yellowknife Company was held on the 4th June 1943, in the city of New York, and was attended by five directors, four of whom were directors of the Bear company. An option agreement with the Frobisher Company, providing for the granting of an option on 300,000 shares of the Giant Company owned by the Yellowknife Company, was approved. On the same date a meeting of the directors of the Bear Company was held in the city of New York, which approved of the Frobisher option and provided for the settlement of the debt owing by the Giant Company to the Bear Company amounting to \$14,000.

Mr. Webster says that early in July, on the solicitation of Carl Pielsticker and a friend of his, Mr. Jaeger from New York, he agreed to become managing director of the Bear Company. He says that he was told he could get the minutes of the companies involved from Mr. Greenberg. He read over the minutes, and he went down to New York to see the other directors, and discussed what he considered the defects in the organization

of both companies. He was concerned with the debts owed by the Yellowknife Company to Bear. He says that he could see no sense in having two companies, and he proposed an amalgamation, and that there was the absurdity of the existing option on all the Yellowknife stock, which was an open option and subject to cancellation by the optionor on ten days' notice.

It does not appear that either Mr. Webster or any of the other directors made any inquiry to ascertain the circumstances under which this option had been given, or the purposes for which it was given. He says that the attention of the directors was directed primarily to the Yellowknife properties and that their efforts were directed entirely to the Yellowknife gold properties. His evidence is: "The future of both of these Companies was with their holdings of Giant." At this time all the issued shares of the Giant Company were in the portfolio of the Yellowknife Company except 200,000 shares. He says he considered the option as "kind of heads I win, tails you lose". He says that if there had been a strike on the Yellowknife gold properties, the prices of the shares would go up and the directors would be duty-bound to cancel the option which was not fair to Bear which was going to do all the work financing it. The option was in Yellowknife's favour, absurdly so.

In the first week of July 1943, Dr. Alexander Dadson, a geologist, was sent to the properties of the Giant Company by Ventures Limited to make a study of the properties and to lay out a program of exploration.

It was under these circumstances that the meetings of the directors of the Yellowknife Company and the Bear Company were held on the 20th July 1943. At this meeting the four directors present, who were all directors of the Bear Company, agreed to transfer to the Bear Company 350,000 shares of its holdings in the Giant Company at 15c. a share, the proceeds to be applied in payment of a debt amounting to \$53,037.28 owed by the Yellowknife Company to the Bear Company. This matter has been the subject of litigation and does not materially affect this issue, other than to show that the directors were liquidating any debt owed by the Yellowknife Company to the Bear Company. The minutes of the meeting of the Bear directors held on the same date show that Mr. Webster had been invited to join the board of directors and to act as managing director, and that he had accepted the invitation. The chairman advised

the board that Mr. Admiral had resigned to make way for the election of Mr. Webster.

At a meeting of the directors of the Yellowknife Company held on the 27th July 1943, Mr. Webster was elected to be a member of the board and Mr. Jaeger resigned as treasurer. Mr. Webster was appointed treasurer in the place of Mr. Jaeger. The head office of the company was moved to offices occupied by the Globe Investments Limited. The option agreement with the Frobisher Company was approved. The minutes contained the following paragraph:

"After discussion it was moved, seconded and carried that in the opinion of the Board no useful object is effected by the continued existence of Yellowknife Gold Mines, Limited and that the interest of this Company and Bear Exploration and Radium, Limited would be better served if the two Companies were merged on the basis of two shares of Yellowknife for one share of Bear Exploration and Radium, Limited and it was resolved that this sale and/or merger should be effected as soon as possible."

Mr. Webster pointed out that the option agreement between the Yellowknife Company and the Bear Company was subject to termination on ten days' notice, and he thought it advisable that this be made more definite. A draft agreement was produced and read to the meeting fixing the termination of the option at a period of two years from 27th July 1943. It was moved and carried that the agreement amending the option be executed.

At a meeting of the directors of the Bear Company, at which the same four persons were present as directors, held one half hour later, Mr. Webster was elected to the board and appointed managing director. The head office of the company was moved to the offices occupied by the Globe Investments Limited. The minutes approved of steps being taken immediately "to effect the sale of Yellowknife Gold Mines, Limited to Bear Exploration and Radium, Limited on the basis of one share of Bear Exploration for two shares of Yellowknife Gold and that the capitalization of the company be increased to 5,000,000 shares". The minutes also approved of a plan to issue 200,000 shares of the capital stock of the Bear Company to shareholders on the proportionate shares of their holdings as soon as the merger

was effected. The matter of prices and underwriting was left in abeyance.

It will be noted that in the minutes of the Yellowknife Company there is no mention of consideration being given to the cancellation of the option on the treasury shares of Yellowknife, nor does the Bear Company undertake to perform any services for the Yellowknife Company or to give any consideration for the additional benefits conferred on the Bear Company by converting the cancellable option into a firm option for two years. The agreement bearing date the 27th July 1943, between the Yellowknife Company and the Bear Company, has been filed as an exhibit. It recites the agreement of the 4th July 1936, and recites the clause in reference to cancellation and that the parties have agreed to fix the termination date of the option. The agreement provides that the option on all shares not already purchased and paid for or released by the Yellowknife Company shall remain in full force and effect until the 27th July 1945, and that all other terms and conditions of the option are to remain in full force and effect and to be binding upon the parties and their successors.

The evidence of Mr. Swanson and Mr. Webster does not satisfy me that the directors were, at the time this option was converted from a cancellable option to a firm option for two years, acting in good faith in the discharge of their duties as directors of the Yellowknife Company. In saying this I do not want it to be assumed that I am approaching the matter with the view that the onus lay on them to do so. It may be that in the circumstances it did. However, in view of the finding I hereafter make it is not necessary for me to decide that point. If the option had any value at all, it was an option, the terms of which protected the shareholders of the Yellowknife Company in case there was any material change in the circumstances in respect of the value of the company's assets. Up to that time, if the Bear Company had advanced any money to the Yellowknife Company on the strength of the option, which I think extremely doubtful on the evidence, it did so on the strength of an option that could be cancelled on ten days' notice, and it was at this time fully repaid for all money advanced.

Mr. Webster's reasons given in the witness-box as to why he, as a director of Yellowknife, expressed the view that the option should be made more definite, are quite unsatisfactory.

Some guide as to what was in the minds of the directors may be gathered from the fact that at the same meeting the plan to merge the Yellowknife Company with the Bear Company was put forward on the basis of two shares of Yellowknife for one share of Bear, and also from the evidence given by Mr. Webster. It has been stressed in the argument that the financial statements of the two companies do not justify this ratio, and it has been pointed out that on balance-sheet value, the value of the Yellowknife stock was greatly in excess of the Bear stock. Be this as it may, in an explanation of why the proposal was on this ratio, Mr. Swanson said: "Bear would cancel its option and would waive its interest to the extent of its share-holdings in Yellowknife, which was a great concession." He also says: "Had I not considered the option important and an asset of Bear, and valid in every respect, I would have bought—perhaps I would have bought other shares, Yellowknife Gold as well." Mr. Webster said that at the outset he could see no sense in having the two companies, and he proposed an amalgamation of the two companies, and there was the absurdity of the option in that it could be cancelled on ten days' notice.

If this option was a real asset held on the 28th January 1944, when it was proposed to surrender it as a concession to the shareholders of the Yellowknife Company, in the event of the merger, it was only such because the directors of the Bear Company who controlled the Board of the Yellowknife Company made it so. Until the 27th July 1943, according to Mr. Webster's evidence, it was an option very favourable to the Yellowknife Company and absurdly unfavourable to the Bear Company. I think the fair conclusion is that as long as the option contained the ten days' cancellation clause, it was of little value to the Bear Company. Mr. Webster, when pressed to explain his position in the transaction, said:

"It is pretty hard. You can't be Dr. Jekyll and Mr. Hyde . . . All the time we were trying to guard the interests of both Companies to the best of our abilities. It is awfully hard to say that one minute you looked after the interests of Yellowknife, and in the other half second turn around and guard the interests of Bear . . . Probably before that we had discussed the thing and from the Bear point of view they said it was not fair to Bear, and from the Yellowknife point of view we realized that, and we therefore made it a more equitable arrangement."

He said they never considered, at the meeting of directors of the Yellowknife Company, cancelling the option on ten days' notice.

From the 27th July 1943 until the option was exercised on the 15th November 1944, the total amount advanced by the Bear Company to the Yellowknife Company was approximately \$300.

Diamond drilling commenced on the Giant properties, which were the only ones that appear to have been developed, late in 1943, and was carried on into 1944. Favourable reports on the drilling commenced to come in about the end of January 1944. These reports were so favourable that the shares of the Giant Company rose in the stock market in a spectacular manner about the month of May 1944, and the shares of the Yellowknife Company increased in value accordingly.

The records filed at the trial show that the price of the Yellowknife shares, between September 1944 and the end of December 1944, ranged from \$1.20 to \$2.08. While these are prices of individual purchases and sales, they give some indication of the value put upon the stock by the public.

In the meantime, Mr. Webster and Mr. Swanson were acquiring additional shares of the Bear Company and Mr. Webster was dealing in a very substantial manner in the Bear shares through a company known as the Globe Investments Company, which he controlled. On the 7th January 1944 the directors of the Yellowknife Company discussed and considered at length the advisability of merging the company with the Bear Company. It was recited in the minutes that the Bear Company owned upwards of a million shares of the issued capital stock of the Yellowknife Company and also had an option on all the unissued treasury shares of the company as shown on the balance sheet.

A resolution was passed that the company merge with the Bear Company and that the solicitors be instructed to prepare an agreement transferring all the assets of the Yellowknife Company to the Bear Company in consideration of the issue and allotment to the Yellowknife Company of 350,000 shares on the basis of one share of the Bear Company for every two shares of the Yellowknife Company, it being understood that the Bear Company should not participate in the distribution. Upon this transfer being completed, it was proposed that the Yellowknife Company should be wound up.

An agreement was entered into by the two companies, dated the 28th January 1944, making provision for the proposed merger. The agreement provides that it is to be subject to the ratification of the shareholders of the Yellowknife Company and the granting of supplementary letters patent to the Bear Company. According to the agreement the Bear Company agrees to cancel its option on the unissued capital stock of the Yellowknife Company granted on the 4th July 1936, and to waive any claims that it may have to participation in the distribution of the assets in the Yellowknife Company by virtue of the fact that it owns 1,005,267 shares of the Yellowknife Company. This agreement was the subject of litigation and was not confirmed by the shareholders, an interlocutory injunction having been obtained from the Court.

In the month of May 1944 an arrangement was entered into between the Yellowknife Company and the Bear Company whereby the Bear Company agreed to charge the Yellowknife Company \$1,000 per month for the management of the Yellowknife Company, this to be plus all direct expenses. This management fee was approved by the directors of the Yellowknife Company on the 8th May 1944.

On the 6th July 1944 the matter of the management fee came up again and was discussed at a meeting of the board of directors of the Bear Company, and it was agreed that a \$1,000 charge was fair and reasonable, Mr. Webster having pointed out that the company was having made a geological survey and that the company's engineers were supervising all the work in connection with the Yellowknife Company.

At the same meeting the board discussed the outstanding options on the treasury shares in favour of Globe Investments Company, the optionee having signified its desire to exercise its option in full. It was unanimously resolved that 414,000 shares of the capital stock of the company be allotted to Globe Investments Limited.

About the 1st August 1944 the directors of the Yellowknife Company asked Mr. Greenberg, who apparently was acting as solicitor at the time, to obtain a legal opinion as to the validity of the option agreement dated the 4th July 1936. The explanation given as to why this opinion was obtained at this time is wholly unsatisfactory. A letter dated 2nd August 1944, from Mason, Foulds, Davidson & Gale, signed by Mr. Gale, and

addressed to Messrs. Mercer & Bradford, the firm with which Mr. Greenberg was connected, clearly indicated that all the circumstances under which this option was originally given were not put before Mr. Gale, nor does it appear that it was disclosed to him that at the time he was asked for an opinion another agreement had been entered into which purported to eliminate the cancellation clause and to make the option a firm option for two years. The only point on which Mr. Gale appears to have been asked for an opinion was whether the option in its original form was void as offending against the rule against perpetuities. Mr. Swanson is most confused in his evidence in regard to this opinion.

The minutes of the meeting of the directors of the Bear Company of the 15th November 1944 state that the Giant Company had decided to increase its capital from three million shares to four million shares and to offer to its shareholders *pro-rata* 300,000 shares of the increased capitalization at a price of \$5, the shares carrying additional optional rights. The chairman explained that the Bear Company owned 525,004 shares of the capital stock of the Giant Company and would be offered the right to purchase 10 per cent. of that number, together with certain additional optional rights. It was resolved that the company exercise its right to purchase the shares of the Giant Company.

The chairman, who was Mr. Webster, also advised the meeting that the Yellowknife Company was heavily interested and had the right to purchase 38,000 shares of the capital stock of the Giant Company, and that the company would be unable to exercise its right to purchase such shares unless the Bear Company exercised its right to purchase shares of the treasury stock of the Yellowknife Company at the price of 30 cents per share as provided in the option of July 1936. The directors were unanimously of the opinion, as shareholders of the Yellowknife Company, that the Bear Company should make every effort to provide that company with sufficient funds to exercise its right to purchase shares of the capital stock of the Giant Company. It was resolved to purchase 700,000 shares of the treasury stock at 30 cents per share pursuant to the terms of the option. Provision was made for selling certain assets of the Bear Company to provide funds for these two transactions, and for issuing 230,700 shares of the treasury stock of the Bear

Company at \$1 per share on the basis of one share for each twenty issued and outstanding.

The minutes of a meeting of the directors of the Yellowknife Company held on the same day, at which four out of the five directors present were common directors of the two companies, show that the matter was considered by them as directors of the Yellowknife Company. The following appears in the minutes:

"The board then considered the advisability of requesting Bear Exploration and Radium Limited to exercise that company's option to purchase shares of the Capital Treasury Stock of this Company pursuant to an option dated July 1936, to a sufficient extent to enable this Company to exercise its right to purchase the said 38,000 shares of the Capital Stock of Giant Yellowknife Gold Mines Limited."

According to the minutes the only alternative suggested whereby this transaction might have been financed was borrowing money from the bank on the security of the shares of Giant Yellowknife Gold Mines Limited. It does not appear, nor does the evidence show, that the directors gave any consideration to the legal position created by the previous events with which I have dealt, or giving the Yellowknife Company the benefit of independent advice with a view to getting rid of the outstanding option and offering shares to its shareholders.

It will be noted that according to the record the meeting of the directors of the Bear Company was held at 2.30 p.m., the meeting of the directors of the Yellowknife Company at 3.30, and an adjourned meeting of the directors of the Yellowknife Company at 4.30, at which the directors approved of allotment of the stock for the sum of \$210,000 cash and the cheque was immediately handed over and the share certificates issued before the close of business that day, although the right to take up the rights issued by the Giant Company would be available for some months. This action was commenced on the 23rd December 1944.

On the 15th January 1945 the Bear Company and the Yellowknife Company entered into a formal agreement rescinding the agreement of the 28th January 1944, which provided for the merger of the two companies and the cancellation of the option. This was ratified at a meeting of the Yellowknife directors and the Bear directors held on the 5th February 1945. On the

25th July 1945, the option in question, on the remaining treasury shares, was extended, by an agreement entered into by the Yellowknife Company and the Bear Company, until the 27th July 1946.

From the time the present directors took charge of the affairs of these companies, it would appear that they quite lost sight of the legal position that they held as the directors of the respective companies, and the fiduciary relationship that existed between them and the shareholders of the corporations.

While the precise relationship of directors to a company has not been defined by the Courts, there is abundance of authority for holding that it is a fiduciary one. The authorities are extensively reviewed in *Regal (Hastings) Limited v. Gulliver et al.*, [1942] 1 All E.R. 378, and are dealt with in many other cases.

It has been strongly argued in this case that, throughout, four of the five directors of the Yellowknife Company were directors of the Bear Company, and as such were interested in the contract, by reason of the fact that they owed a duty to the Bear Company to obtain for it the best terms possible, while on the other hand, they owed a duty to the Yellowknife Company to see to it that the Bear Company received no undue advantage. *Aberdeen Railway Company v. Blaikie Brothers* (1854), 1 Macq. 461 and *Transvaal Lands Company v. New Belgium (Transvaal) Land and Development Company*, [1914] 2 Ch. 488; *Ernest v. Nicholls* (1857), 6 H.L. Cas. 401, 10 E.R. 1351, are relied on.

In the view that I have taken of the facts as given in evidence at the trial, the rights of the parties are to be determined on a much broader basis. I have come to the conclusion that the common directors of these two companies, in bad faith, took advantage of the fiduciary position in which they stood to the Yellowknife Company to promote the interests of the Bear Company, in which they then were, or shortly afterwards became, substantial shareholders, all to the great detriment of the Yellowknife Company.

I cannot accept the evidence given by the three directors of the Yellowknife Company who testified in respect of their part in the transaction, as satisfying me of their good faith. They did not impress me favourably in the witness-box. Their evidence convinces me quite otherwise.

I find that the revival of the option of 4th July 1936 and the proposed merger of the Yellowknife Company with the Bear Company, together with the agreement of 27th July 1943, making a firm option for two years, was all part of a fraudulent plan to give to the Bear Company certain speculative advantages in respect of the prospective development of the Giant claims, at the expense of the Yellowknife Company and against its interest. The culmination of this plan was the allotment of the 700,000 shares of the stock to the Bear Company in November 1944.

While the Courts hesitate to lay down any precise definition of fraud as the term is used in the civil courts, Kerr on Fraud and Mistake, 6th ed. 1929, p. 1, takes the following passage from Story's Equity Jurisprudence, 2nd English ed. 1892, p. 116, s. 187, where the subject is comprehensively discussed:

"Fraud, in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another."

"A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression 'constructive fraud' came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience." Per Viscount Haldane L.C. in *Nocton v. Lord Ashburton*, [1914] A.C. 932 at 954.

The facts of the case at bar, in my view, go beyond what is required by these and other authorities to give relief in a court of equity.

It is, however, strongly argued that the present plaintiff is estopped from maintaining this action by reason of the fact that he is one of the board of common directors who originally granted the option in 1936 and that he stood by and did no act to bring about its cancellation and that he sought to reap the benefits therefrom and when it suited him to attack its validity he did so. Whatever might have been said had this action been founded solely on the events leading up to July 1943, on the evidence given before me, I cannot find that Gray, either actually or constructively, acquiesced in, or approved of, the course of action of the directors in 1943 and subsequently, in respect of the matters in issue, which is the vital matter for consideration in this case. I think the decision in *Mosely v. Koffyfontein Mines, Limited*, [1911] 1 Ch. 73, affirmed [1911] A.C. 409, followed in *Smith v. Humbervale Cemetery Co.* (1915), 33 O.L.R. 452, 22 D.L.R. 773, applies to the case at bar.

I have, therefore, come to the conclusion that the principles of law laid down in *Fullerton et al. v. Crawford et al.*, 59 S.C.R. 314, 50 D.L.R. 457, [1919] 3 W.W.R. 843, and *Henderson v. Strang et al.*, 60 S.C.R. 201, 54 D.L.R. 674, [1920] 1 W.W.R. 982, followed by Hope J. in *Gray v. Yellowknife Gold Mines Limited et al.* (No. 1), [1945] O.R. 688 at 708, [1946] 1 D.L.R. 443, are inapplicable to the facts of this case.

Much argument was addressed to me by counsel, based on the provisions of by-laws 54 and 55 and s. 93 of The Companies Act, R.S.O. 1937, c. 251, as they were construed by Hope J. in *Gray v. Yellowknife Gold Mines Limited et al.*, *supra*. In view of what I have already said as to the facts shown in evidence, it is unnecessary to deal with these matters. Reading by-laws 54 and 55 together as part of a code governing the affairs of the company, together with s. 93 of The Companies Act, I do not think that it could be argued that these give validity to the impugned transactions as I have viewed them. Nor do I feel that it is necessary to deal with the defence of *res judicata*, raised in the pleadings but not strongly argued. The real issue in this case was neither raised nor dealt with in the case of *Gray v. Yellowknife Gold Mines Limited et al.*, as far as this record shows.

Judgment will, therefore, go declaring that the allotment and issue of 700,000 shares of the Yellowknife Company is void and setting the same aside and declaring that the agreement of

27th July 1943 is void, and setting it aside. It necessarily follows that the agreement of 4th July 1936 must also be set aside. A court of equity will not permit the Bear Company to be put in the position that by the fraudulent act of the directors in question they have prevented the Yellowknife Company from terminating the said agreement and at the same time make it now subject to ten days' notice before cancellation. "And courts of equity will not only interfere in cases of fraud to set aside acts done; but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done": Story, *op. cit.*, p. 116, s. 187. An injunction will go restraining the defendant the Yellowknife Company, its servants or agents, from allotting or issuing any of its treasury shares pursuant to the said option and restraining the Bear Company, its servants or agents, from voting the 700,000 shares of the Yellowknife Company already issued, at any meeting of the Yellowknife Company and from assigning, transferring, or otherwise dealing with the same. The plaintiff will have the costs of the action throughout.

Judgment accordingly.

Solicitors for the plaintiff: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitors for the defendant Bear Exploration and Radium Limited: Fennell, Porter, McLean & Davis, Toronto.

Solicitors for the defendant Yellowknife Gold Mines Limited: Blake, Anglin, Osler & Cassels, Toronto.

[HOGG J.]

Western Ontario Natural Gas Company Limited v. Aikens et al.

Conspiracy—Civil Action—Elements of Cause of Action—Action by Company against Former Directors and Majority Shareholders—Insufficiency of Mere Inadequacy of Consideration in Transaction.

Companies — Directors — Fiduciary Relationship to Shareholders and Creditors — Breach of Such Duty — Insufficiency of Evidence to Establish—Full Disclosure to Shareholders in Connection with Proposed Transaction.

An action was brought in the name of a company against several persons, formerly directors and majority shareholders, alleging a conspiracy, wrongful and fraudulent and contrary to the best interests of the company, and in violation of the defendants' fiduciary duties and obligations to the company. The action arose out of an agreement for the sale by some of the defendants to another group of persons of their shares in the plaintiff and another company, and the issue of bonds by the plaintiff to provide funds to pay for such shares.

Held, the action failed. It was essential that fraud should be proved. The Court would not take part in an endeavour to solve the difficulties in which a company found itself as the result of ordinary business vicissitudes, and fraud was not to be inferred from the mere fact that disaster overtook a company. The evidence did not establish that the defendants, or any of them, had conspired together to have the plaintiff purchase shares in an illegal way, nor was it shown that the consideration for the issue of the bonds was so grossly inadequate as to constitute evidence of fraud. The evidence did not support the allegation that the directors and officers of the company had not made full disclosure, at the shareholders' meeting at which the bond issue was authorized, of the details of the proposed plan and its effect upon the company. Nor did the evidence disclose, on the part of those directors who had not taken part in the negotiations, such carelessness, in failing to inform themselves of the details and probable effect of the transaction, as would amount to a breach of their fiduciary duty towards the company, nor did it establish that they and the other defendants were in any way parties to a fraudulent scheme. Furthermore, the evidence did not establish that the shareholders who held the majority of the shares of the plaintiff company had exercised their voting power to commit a fraud upon the minority shareholders, or shown a lack of good faith in dealing with such shareholders.

Review of authorities.

AN ACTION for damages for conspiracy. The facts, and the nature of the plaintiff's claim, are fully stated in the reasons for judgment.

10th to 12th and 15th to 19th October 1945, 3rd to 7th and 10th to 12th December 1945, 7th to 11th and 14th to 18th January 1946, 18th to 22nd and 25th to 28th March 1946. The action was tried by HOGG J. without a jury at Toronto.

H. C. Walker, K.C., for the plaintiffs.

G. W. Mason, K.C., for the defendants *W. J. Aikens, E. J. Aikens and W. T. Henderson*, as executors, and for the defendant *Martin*.

R. F. Wilson, K.C., for the defendant Dougher.

C. A. Thompson, K.C., for the defendant Richards.

T. M. Mungovan, K.C., for all other defendants.

17th September 1946. HOGG J.:—The plaintiff, which is a joint stock company incorporated by letters patent of the Province of Ontario on the 22nd June 1914, instituted the present action on the 31st December 1942, claiming damages in the sum of \$298,000, based upon allegations of a conspiracy entered into by the defendants, which was wrongful and fraudulent and contrary to the best interests of the plaintiff company and in violation of their fiduciary duties and obligations to the plaintiff company as the majority shareholders, directors, or officers thereof.

The defendants William J. Aikens, Edward J. Aikens and William T. Henderson were, at such times as are material to the matters involved in the action, executors of the will of the late William J. Aikens, deceased, and the action is brought against these defendants as executors, as well as in their individual capacity. The said William T. Henderson is a defendant also as the executor of the will of his wife, the late Mrs. Victoria Henderson, deceased. All of the defendants were shareholders, and certain of the defendants were directors and officers, of the plaintiff company at various times between the years 1937 and 1942.

Upon the close of the plaintiff's case, counsel for the several defendants other than the defendant executors and the defendants William J. Aikens and William T. Henderson in their individual capacity and the defendant T. M. Mungovan, moved to have the action dismissed as against the defendants whom they represented, and I dismissed the action as against such defendants for the reasons given at the time. [The reasons for judgment on these motions are printed at the end of the report.]

Owing to the complicated circumstances involved in the action, very considerable evidence was given during the course of the trial, the relevancy of which I was not in a position to determine at the time, and it was not until towards the conclusion of the trial that it became apparent that part of the evidence tendered and received was not material to the disposition of the issues before the Court. I regret that I consider it necessary to relate something of the history of the transaction, and that this cannot be done except at some length.

The purpose and undertaking of the plaintiff company was to acquire and develop properties in which natural gas was found, and the production and selling of this gas. The company had a nominal capital of 100,000 shares at \$10 each, of which 30,801 shares were issued as common stock. The company held leaseholds of gas-producing property in the Haldimand area, as well as in an area called the Brownsville field, both in the Province of Ontario, and it is with respect to this latter field that this action is principally concerned. The Brownsville gas field is an area producing natural gas, situated to the south of the village of Brownsville, and this field was in full production during the years 1937, 1938 and 1939. Operating in this field, in addition to the plaintiff company, were a number of producers consisting of syndicates, companies and individuals, almost all of whom were under contract to sell the gas from their wells to the Oxford Pipe Line Company Limited, hereinafter called "the Oxford Company". The gas produced from the wells of the plaintiff was disposed of in large part to the Oxford Company and the plaintiff company through a subsidiary company known as the Dunn Natural Gas Co. Ltd., which had contracts for the sale of gas to the Monarch Knitting Co. Ltd., and several other consumers.

The Oxford Company, a public utility company, was incorporated by letters patent of the Province of Ontario on the 1st February 1937. The operations of the Oxford Company were confined to the purchase of gas, the purification of the same, and the selling of the purified gas to consumers. This company did not own or operate gas wells.

In the year 1938, and subsequently, the Oxford Company owned and operated a plant for the purification of the gas, which had a considerable content of sulphur, and also owned 13 miles of 6-inch pipe-line running from the Brownsville gas field to the town of Ingersoll. The Oxford Company had a contract for the sale of some 450,000,000 cubic feet of gas annually to the Southern Ontario Gas Co. Ltd., controlled by the Dominion Natural Gas Company. It also held certain franchises from villages and towns along the route of the pipe-line, and in 1938 was in negotiation with Gypsum Lime and Alabastine, Canada Ltd., of Beachville, Ontario, for the sale of a large quantity of gas to that company to be used in its manufacturing processes, the proposed contract providing for a quantity of gas to be taken by the

Gypsum Company which might reach 450,000,000 cubic feet per annum. In order to fulfil further contracts as aforesaid, which the Oxford Company was negotiating, or had negotiated, for the sale of gas, it contemplated the construction of a second purification plant and another 6-inch pipe-line of $22\frac{1}{2}$ miles in length from the Brownsville field to the Gypsum Company plant at Beachville.

The defendant executors held for the Aikens Estate 16,433 shares of the plaintiff company, and a large proportion of the remainder of the issued shares were held in various amounts by Messrs. Aikens and Henderson individually and by the other defendants. The Oxford Company had outstanding 1,100 preferred shares and 16,000 common shares, of which 777 preferred shares and 13,780 common shares were held by the defendant executors for the said estate. The said estate held therefore a majority interest of the shares of both companies.

The defendant Aikens took charge of the operations of the plaintiff company and the Oxford Company after the death of his uncle, W. J. Aikens, Sr., in 1937. He gave evidence to the effect, and it is in no manner contradicted, that he at once commenced to negotiate for new contracts for the sale of gas produced in the Brownsville field, the principal one of which was that concluded with the Gypsum Company on the 28th October 1938, to which reference has been made. In order to enable the construction of the pipe-line from the Brownsville field to Beachville, which has been referred to during the course of the trial as "no. 2 pipe-line", it was necessary to secure franchises from the various municipalities along the proposed line of pipe, and on the 3rd February 1937 a contract for the construction of an additional purification plant and the no. 2 pipe-line was entered into between the defendant Aikens and the Oxford Company.

In January 1938 one Franklin K. Schiener, of the city of New York in the United States of America, who had had business dealings with the defendant Aikens some time previously in connection with other matters, requested information in connection with the natural gas operations of the plaintiff company and the Oxford Company. Mr. Aikens arranged with Mr. Schiener that he should receive full information regarding the business operations and financial structure of these companies. Some months later, Schiener asked Aikens to meet certain persons in the city of New York who might be interested in acquiring an interest in

the plaintiff company. In August 1938 Aikens went to New York and there met certain gentlemen, referred to hereafter as "the purchasing group", with whom he discussed the sale to them of the shares of the plaintiff company and the Oxford Company held by the estate of the late Mr. W. J. Aikens. These gentlemen composed a syndicate which had as its members Mr. S. H. Greenspau; The Oceanic Insurance Company of Nassau (which afterwards became the Oceanic Trading Company of Panama and in which Col. Ellery C. Huntington Jr. and Mr. David M. Milton held a number of shares); a company called the Securities Administration Ltd. (in which the Oceanic Insurance Company held an interest); and Mr. Albert F. Milton (who was also a shareholder of the Oceanic Trading Company). The Oceanic Insurance Company was the controlling factor in the syndicate, having a much larger interest therein than the other members, and this company acted as the syndicate manager.

Mr. Schiener placed before the members of the syndicate the information he had acquired respecting the plaintiff company and the Oxford Company. It was contended by counsel for the plaintiff that Schiener was an agent of the defendant executors. Col. Huntington, on direct examination, said that the defendant Aikens told him Schiener was authorized to act on behalf of the executors or the majority shareholders of the plaintiff company, but on cross-examination Col. Huntington stated he was not certain whether Aikens told him Schiener had authority to bind the estate. Aikens denies positively ever having given Schiener any authority to represent the estate in the negotiations, and states that Schiener merely had permission to obtain full information and knowledge of the business and operations of the plaintiff company and of the Oxford Company. The defendant W. T. Henderson testified that he had no knowledge whatever of Schiener, or his activities, until after the transaction had been completed for some considerable time. There is no evidence that Schiener ever received any authority from the executors as a whole to act for, or to bind, the estate. The purchasing group agreed with Schiener to give him 7,500 shares of a company to be formed, to acquire the shares being purchased, for his services in connection with the transaction, and the defendant executors, after the matter was completed, gave Schiener some four or five thousand dollars. I am of the opinion that the evidence does not establish that Mr. Schiener was an

agent for the estate or for the majority shareholders of the plaintiff company, and that, therefore, certain letters and reports from Schiener, objected to by counsel for the defendants, cannot be considered to be evidence in the action.

As a result of the meeting between Aikens and the purchasing group, a memorandum of agreement was drawn up, dated the 29th September 1938, in which a method was outlined by which the purchasing group proposed to acquire the 16,433 shares of common stock of the plaintiff company, and the 13,780 shares of the common stock of the Oxford Company, held by the defendant executors for the Aikens Estate.

Further meetings and discussions took place from time to time between the various parties to the transaction, and it was decided that the shares held by the defendant W. T. Henderson and his wife, and several other shareholders, would be included in the transaction. The defendant Henderson took part from time to time in the negotiations, and was consulted by the defendant Aikens with respect to certain of the difficulties which arose in working out the details of the sale and purchase. In December 1938 an agreement was entered into by the defendant executors and Col. Huntington, Messrs. Greenspau and D. M. Milton, acting on behalf of a new company to be incorporated to acquire, on behalf of the purchasing group, the aforesaid shares of stock. The Company eventually incorporated for this purpose was Transadian Oil and Gas Co. Ltd., hereinafter called "the Transadian Company". The terms of this agreement are in effect that the purchasing company was to pay over to the executors of the Aikens Estate the sum of \$245,000 against the delivery of certificates representing 18,903 common shares of the plaintiff company held by the executors and by certain of the other defendants, and \$240,000 principal amount of first mortgage or lien bonds of the plaintiff company. The executors were to deliver 13,780 shares of the Oxford Company, of which mention has been made, to the plaintiff company, to be paid for by the delivery of bonds of the plaintiff company in an amount fixed by a formula set out in the agreement. A further term of the agreement was that the said executors were to pay the sum of \$85,000 to the plaintiff company upon the understanding that that company would advance such sum to the Oxford Company, to be used in the construction of the 6-inch pipe-line from the Brownsville gas field to the town of Beachville. The defendant executors

agreed to have the plaintiff company authorize the issue of \$1,000,000 principal amount of bonds.

The purchasing group immediately took steps to investigate the title of the properties and leases held by, and the financial position of, the plaintiff and Oxford companies. The firm of Messrs. Ralph E. Davis, Inc., well-known experts in the oil and natural gas industry, were employed to make an investigation and to report upon the Brownsville gas field and the properties of the companies in question. As a result of such investigation, Mr. Gail F. Moulton, the vice-president of the Davis Company, made his report dated the 9th November 1938, in which he estimated that the remaining recoverable reserves of gas in the Brownsville field, as of August 1938, were 10.7 billion cubic feet. Mr. Moulton reported that the general situation in respect of natural gas in Ontario was that "there was not a sufficient supply to adequately service the markets available. Even if a considerable quantity of new gas reserves were discovered, this situation would still exist, and for that reason, there is little likelihood of any new factors adversely affecting a new project such as a line to the vicinity of Beachville."

Messrs. Geo. A. Touche & Co. of Toronto, chartered accountants, were retained by the purchasing group to examine and audit the books and accounts of the plaintiff company and the Oxford Company, and supplied full and comprehensive reports on the financial position of the companies in question, dated 5th December 1938 and 1st February 1939. In addition to the reports of Messrs. Touche & Co., the purchasers were placed in possession of financial statements and balance sheets of the plaintiff company and the Oxford Company, prepared by Messrs. Long and Marshall, chartered accountants of Toronto.

The firm of Messrs. Osler, Hoskin & Harcourt, solicitors, of Toronto, were retained to investigate the title of the leaseholds and other properties of the companies and to attend to all the legal requirements necessary in completing the transaction.

According to the evidence of the defendant Aikens, the sum of \$1,000,000 in bonds was suggested by the purchasing group in order that there might be a surplus for the construction, if necessary, of additional pipe-lines to Stratford and other places and for the expansion of the development work of the plaintiff company of prospecting and of drilling further wells. The matter

of forming an exploration company was also the subject of discussion.

Col. Huntington and Mr. A. F. Milton visited and inspected the Brownsville field.

As early as November 1938 the defendant Aikens suggested to Col. Huntington that an effort should be made to obtain further amounts of common stock of the plaintiff company and the Oxford Company, and Aikens obtained options on shares other than those held by the parties to the sale. Nothing further was done with respect to these options by the purchasing group until December 1940, when the Transadian Company placed a proposition before the holders of capital stock of the plaintiff company, providing for the exchange of such shares for bonds.

Further negotiations were carried on between the interested parties, and as a result the number of bonds to be issued was increased to \$245,000. It was also agreed that the sum of \$17,500 would stand in lieu of interest on the sum of \$85,000, apparently with the object of avoiding taxation, if possible.

A meeting of the directors of the plaintiff company was held on the 19th December 1938, at which were present the following directors, namely, the defendants Aikens, Martin, McCutcheon, Mungovan and Dougher. Proposed by-laws in furtherance of the transaction were placed before the meeting and discussed. By-law no. 5 was enacted to the effect that the directors of the company were authorized to borrow an amount not exceeding \$1,000,000, and for such purpose to issue first mortgage bonds of the company. To secure the repayment of the said bonds, the directors were authorized to execute a deed of trust and mortgage, in favour of the trustee for the holders of the bonds, which would create a first charge upon the undertaking and assets of the company. By-law no. 6, which set out the terms of the transaction, was also discussed at the meeting and was enacted. This by-law recited that the directors of the company deemed it advisable and in the best interest of the company that the company sell to the executors of the estate of the late Mr. W. J. Aikens \$445,000 par value of the first mortgage bonds for \$85,000 cash and 13,780 common shares of the capital stock of the Oxford Company. The directors were authorized to execute an agreement between the company and the said executors, which said agreement was made a schedule to the by-law. The

agreement was in the form of a letter addressed to the executors from the company and the acceptance by the three executors, and sets out that the plaintiff company desires to purchase 13,780 shares of the common stock of the Oxford Company. It is further stated that, with this purchase in mind, the company desired to arrange to borrow from the executors the sum of \$85,000 which the plaintiff company would then advance to the Oxford Company to enable it to construct a pipe-line to Beachville. It is estimated the earnings of the Oxford Company would be increased, if such pipe-line were in operation, by the sum of approximately \$30,000 per annum, and the earnings of the plaintiff company would be increased by the sum of \$10,000 per annum. It is further set out that the plaintiff company was willing to value the Oxford shares and the advance requested to be made, at the agreed sum of \$385,000, provided that the executors were willing to accept bonds of the company in payment for the Oxford shares and provided that the executors would cause the Oxford Company to enter into an agreement with the plaintiff company pursuant to which, in consideration of the advance to the Oxford Company of \$85,000 or such amount as might be necessary to build the said pipe-line, that company was to expend such sum in payment for the construction and putting into operation of the said pipe-line. The Oxford Company was to repay the amount of such advance, without interest, out of earnings, together with the sum of \$17,500, and upon the payment by the executors to the plaintiff company of the said \$85,000 the executors were to receive delivery of the \$245,000 of bonds. The agreement then provided a certain formula according to which the executors were to receive a further amount of bonds, depending upon the earnings of the plaintiff company over a certain period. Mr. Aikens refrained from voting on the passing of these by-laws. At a meeting of directors held on the 23rd December 1938, Mr. Aikens resigned as president of the plaintiff company and Mr. Mungovan was elected to this office.

The annual meeting and a special general meeting of the plaintiff company's shareholders were also held on the 23rd December 1938. At the annual meeting the following directors were elected: the defendants Wilson, Mrs. Lawrie, Miss Fairall, Richards and Mungovan. At the special general meeting there

were present in person: the defendants W. J. Aikens, Adams, Martin, Dougher, Richards, McCutcheon, Wilson, Mungovan, Miss Fairall and Mrs. Lawrie, and one Harry Blake, holding in all 6,315 shares, and there were represented by proxy the defendants the estate of the late Mr. W. J. Aikens, W. T. Henderson, Mrs. Henderson, McCutcheon and several other shareholders, holding in all 26,216 shares.

Balance sheets of the plaintiff company and the Oxford Company were available to the shareholders present, as well as copies of the by-laws to which reference has hereinbefore been made, and a letter, or circular, giving an outline of the transaction, had been sent to each shareholder of the company, signed by the executors. This letter is material because of one of the main contentions of the plaintiff, namely, that the shareholders were not given a reasonable and sufficient explanation at the meeting of the transaction in question in order that they might form an opinion whether or not the transaction was in the best interest of the plaintiff company, and that such information was withheld by the defendants.

Mr. Mungovan, who succeeded Mr. Aikens as president, acted as chairman and conducted the proceedings, and explained the business to be transacted to the meeting. After certain discussion, By-laws nos. 5 and 6 were, according to the minutes, unanimously approved and confirmed. Mr. Blake, who held 230 shares of the plaintiff company and was present at the meeting, gave evidence to the effect that the minutes of the meeting were not correct. His evidence was that the chairman asked for a show of hands of those approving of the by-laws, but that he, Blake, did not vote for the by-laws and that a negative vote was not requested. However, on cross-examination, Blake qualified this statement and said that to the best of his recollection no contrary vote was asked for, and if a contrary vote were asked he did not recollect this fact. Blake also said that the defendant Aikens discussed the by-laws and explained them and the agreements to the meeting, and that although Blake was not satisfied with the explanation, he did not make any protest at the time. The evidence of Aikens and Mungovan is that Aikens took no part in the explanation given to the meeting owing to the fact that he was unwell at the time, and that Mr. Mungovan attended to this part of the business. There is evidence to the effect that

Mr. Blake was anxious to sell his shares if he could get the price that he wished. The defendants Aikens and Mungovan both testified that Blake voted for the by-laws at the meeting, that a contrary vote was called, that Blake did not vote against the enacting of the by-laws, and that the vote was unanimous. Considerable evidence was given with respect to Blake's connection with the matter now under consideration, which I have concluded is not material in so far as the issue in this action is concerned.

On the 1st May 1939 an indenture of mortgage and deed of trust from the plaintiff company to the Montreal Trust Company was executed, by which the plaintiff company pledged with the trustee all of its property and assets as security for the payment of the principal and interest of an issue of bonds which should not exceed the sum of \$1,000,000. The first series of bonds were designated as series "A", and were to be issued for an aggregate principal amount of \$245,000; additional bonds to be known as series "B" would be issued for an amount not exceeding \$200,000, the exact amount thereof to be computed according to a formula based upon the earnings of the plaintiff company and the Oxford Company for a period of twelve consecutive months commencing not before 1st April 1939 and not later than 1st October 1939. Subsequently, \$245,000 series "A" bonds were delivered to the defendant executors, who delivered the said bonds to the Transadian Company. The executors delivered also to the Transadian Company 18,903 shares of the plaintiff company, and the Transadian Company paid to the defendant executors the sum of \$160,000 and to the plaintiff company the sum of \$85,000. The plaintiff company then advanced the said sum of \$85,000 to the Oxford Company under the terms of the agreement between the two companies to which reference has already been made. The defendant executors subsequently deposited with the Montreal Trust Company the 13,780 common shares of the Oxford Company. On the 27th April 1940 the defendant executors gave notice in writing that they had selected 1st May 1939 as the date of commencement of the twelve months' period of which the consolidated earnings of the plaintiff company were to be ascertained for the purpose of computing the amount of series "B" bonds to be issued to them.

On the 9th September 1940 Messrs. Long and Marshall certified that on the basis of earnings of the plaintiff company, the Oxford Company, and the Dunn Natural Gas Co. Ltd. for

the twelve months ending 1st May 1940, the defendant executors would be entitled to receive, upon delivery of the 13,780 common shares of the Oxford Company, the full amount of \$200,000 of first mortgage bonds of the plaintiff company. A dispute arose between the defendant executors and the purchasing group with respect to this matter, which, after considerable discussion and negotiation, was settled by the issue and delivery to the defendant executors of \$92,500 of series "B" bonds and \$40,000 of series "C" bonds of the plaintiff company, which the Trans-adian Company agreed to purchase from the executors for the sum of \$92,500 cash. This settlement culminated in a supplementary indenture which is dated the 1st September 1940, between the plaintiff company and the Montreal Trust Company, which modified the original trust mortgage and provided for the issue of the series "B" and "C" bonds in the amounts already mentioned.

The terms of the settlement having been carried out, the 13,780 common shares of the Oxford Company were delivered.

The plaintiff company alleges in its statement of claim, in para. 17, that the whole of the above related transaction was the result of a conspiracy entered into by the defendant executors and by the defendants Aikens and Henderson individually, and as is set out in the said paragraph:

" to enrich themselves and other defendants and the Aikens Estate at the expense and to the detriment and damage of the Plaintiff Said plan, scheme and conspiracy was executed and carried out as hereinafter alleged, and each and all of the defendants (except Charles E. H. Freeman, as Administrator) and Lee W. Adams, made, entered into, participated in, aided and abetted said plan, scheme and conspiracy"

The conspiracy is alleged to be wrongful and fraudulent as to the plaintiff company, and contrary to its best interests and in violation of the fiduciary duties which the defendants owed to the plaintiff company as majority shareholders, directors, or officers thereof.

Para. 49 of the statement of claim reads:

"By reason of the foregoing, Plaintiff has been injured and has suffered damages in the sum of at least \$298,000 through and by reason of the wrongful and fraudulent acts of the defendants and the violation by them of their respective fiduciary duties and obligations to the Plaintiff, as hereinabove alleged."

It was contended by counsel on behalf of the plaintiff company that an allegation of conspiracy was not the sole ground of action, and that, apart from any conspiracy to defraud, one of the grounds of action is a breach of trust on the part of each of the defendants in their capacity as directors, shareholders and officers of the plaintiff company and that such an allegation, which is pleaded by para. 49 of the statement of claim, is distinct from that of conspiracy. I am unable to conclude that para. 49 extends or enlarges the claim based upon the conspiracy already pleaded.

This paragraph must be considered in the light of the allegations which precede it. The paragraph commences with the words "By reason of the foregoing", and further sets out that the plaintiff suffered damages by reason of "the wrongful and fraudulent acts of the defendants and the violations by them of their respective fiduciary duties and obligations to the plaintiff". This language is, however, qualified by the immediately subsequent words, "as hereinabove alleged".

One hesitates to define again the word "conspiracy". It is an element of the common law which has been the subject of judicial consideration from the earliest days. According to Halsbury's Laws of England, 2nd ed., vol. 9 (1933), p. 43, a conspiracy is formed when "two or more persons agree together to do something contrary to law, or wrongful and harmful towards another person, or to use unlawful means in the carrying out of an object not otherwise unlawful".

The two main questions which arise for determination in this action are: (1) whether there was a conspiracy as alleged by the plaintiff company entered upon by the defendants, by reason of which the plaintiff was defrauded and thereby suffered loss; and (2) whether the action, although nominally brought by the plaintiff company, is not in reality an action on behalf of the purchasing group, the actual plaintiff, and the party seeking damages, being the Transadian Company.

With respect to the first of the two questions, it is essential, in so far as this action is concerned, that fraud should be proved. The Court will not take any part in an endeavour to solve the difficulties in which a joint stock company may find itself, arising out of the ordinary vicissitudes of business operations. Lord Davey said in the Judicial Committee of the Privy Council, in an appeal from our own Court, in *Burland et al. v. Earle et al.*,

[1902] A.C. 83, C.R. [12] A.C. 344: "It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so."

But where there is fraud the case is very different. Fraud is not to be inferred, however, simply because disaster overtakes a company on account of bad business judgment on the part of those in charge of its affairs. Fraud must be proved to exist in fact.

In *Wilson v. Church* (1879), 13 Ch. D. 1, Brett L.J. said, at p. 51: "It seems to me that no recklessness of speculation, however great, and that no extortion, however enormous, is fraud. It seems to me that no man ought to be found guilty of fraud unless you can say he had a fraudulent mind and an intention to deceive."

Hagarty C.J.O. said in *Beatty et al. v. Neelon et al.* (1885), 12 O.A.R. 50, affirmed 13 S.C.R. 1, in an action of deceit where damages were sought on the ground of fraud: "I think the very least that must be expected from anyone seeking a remedy like the present, is a proof of his case by evidence of undoubted clearness and proof of admitted cogency."

In *Sweeney v. Coote*, [1907] A.C. 221, in the House of Lords, Lord Loreburn L.C. spoke of an action founded on conspiracy as follows: "It is an action for conspiracy . . . In such a proceeding it is necessary for the plaintiff to prove a design, common to the defendant and to others, to damage the plaintiff, without just cause or excuse. That, at all events, it is necessary to prove. Now, a conclusion of that kind is not to be arrived at by a light conjecture; it must be plainly established. It may, like other conclusions, be established as a matter of inference from proved facts, but the point is not whether you can draw that particular inference, but whether the facts are such that they cannot fairly admit of any other inference being drawn from them."

To put the matter in its most simple terms, did the fact, under the circumstances present, that authority was given for an issue of \$1,000,000 of bonds of the plaintiff company, and an actual issue was made of \$445,000 par value of such bonds, constitute fraud against the plaintiff company, and did the defendants enter into a common design to commit such fraud?

Does the evidence reasonably establish that the defendants conspired together to have the plaintiff company purchase their stock in an illegal way, namely, by having the company pay an exorbitant amount for their shares and getting the consent of the company to do so by fraudulent means?

The plaintiff company acquired 13,780 shares of common stock of the Oxford Company from the defendant executors, which gave it the control of that latter company. It received \$85,000 in cash, which constituted the amount of the loan to be made to the Oxford Company to enable the no. 2 pipe-line to be constructed and put into operation. It received the sum of \$17,500 in cash in lieu of the interest on the said loan. There were issued \$245,000 bonds of the plaintiff company for which the defendants received \$160,000, and there were issued to the defendants the additional "B" and "C" bonds to which reference has been made.

It is admitted by counsel for the plaintiff that it could not be held to be wrongful for the majority of the shareholders to desire to sell the shares of the company held by each of them at as high a price as could be obtained, but it is contended that because of the methods used by the defendants to bring about the sale of their shares, and because by the device of causing the plaintiff company, at a meeting of shareholders called for the purpose, at which, it is contended, proper disclosure of the details of the deal was not made, to authorize the issue of a large number of bonds, of which a very considerable amount was issued, and furthermore, because for the issue of bonds an entirely inadequate consideration was received, a fraud was perpetrated upon the plaintiff company, as a result of which it suffered serious loss. It is argued on behalf of the plaintiff company that the consideration received by the plaintiff, for the issue of the bonds in question, was so inadequate that it in reality amounted to a failure, or at least a partial failure, of consideration.

The point stressed by Mr. Walker, in the course of a lucid and forceful argument, was that the plaintiff did not receive adequate and proper consideration for the issue of the bonds because the defendants had conceived the plan or scheme of enriching themselves at the expense of the plaintiff company, and, in furtherance of this conspiracy, did not place before the shareholders of the company such information and details of the transaction as

would enable those shareholders properly and intelligently to consider the whole matter, and to ascertain its real effect upon the fortunes of the plaintiff company.

The defendant executors, at the time of the death of Mr. Aikens, Sr., valued the shares of the plaintiff company for succession duty purposes at the sum of \$2.50 per share, and the argument is advanced that the amount per share received by the executors and the other vendor shareholders exceeded by so large an amount this sum of \$2.50 per share that the result was that the book value of the shares of the plaintiff company was ruined.

In opposition to the stand taken on behalf of the plaintiff, the defendants allege that there must also be taken into account, in estimating the whole consideration received by the plaintiff company for the issue of bonds, the future prospects of the company, the opening up of new wells, the expanding market to be obtained through additional contracts for the sale of gas, such as that entered into with the Gypsum Company and including prospective consumers such as the cities of Stratford and Kitchener. The defendants contend that the whole future of the plaintiff was enhanced by the transaction which is under attack, and that when the entire picture is scrutinized there is found ample consideration, flowing to the plaintiff company, to justify the transaction.

In referring to the subject of inadequacy of consideration, Duff J., afterwards Chief Justice of Canada, remarked in *Hood et al. v. Caldwell et al.*, [1923] S.C.R. 488, [1923] 2 D.L.R. 1026: "It was long ago settled that shares might validly be paid for in 'meal or malt'."

Kerr on Fraud and Mistake, 6th ed. 1929, referring to the same subject, states at pp. 199-200:

"Mere inadequacy of consideration or inequality in a bargain is not a ground to set aside a transaction, if the parties were on equal terms and in a situation to judge for themselves, and performed the act wittingly and willingly . . . But inadequacy of consideration, if it be of so gross a nature as to amount in itself to evidence of fraud, is a ground for cancelling a transaction. In such cases the relief is granted, not on the ground of the inadequacy of consideration, but on the ground of fraud as evidenced thereby."

In *Harrison v. Guest* (1855), 6 DeG. M. & G. 424, 43 E.R. 1298, Lord Cranworth, L.C. said, at p. 435: "The result was, that there was a purchase for what turns out to be an extremely inadequate consideration. That, however, is of no consequence, if the parties were in a situation to judge for themselves".

In our own Court, in *Loranger v. Haines* (1921), 50 O.L.R. 268, 64 D.L.R. 364, in the judgment of an Appellate Division, Meredith C.J.C.P. said, at p. 272: " . . . the Courts cannot be concerned with the adequacy of the consideration; it is commonly repeated in the Courts that it is enough that the defendant got all he contracted for; and that the value of the things contracted for is measured by the appetite of the contractor "

Lennox J. expressed his opinion in these words, at p. 277: "Where the parties are equally capable of looking after their own interests, and in the absence of evidence of fraud, the Courts do not inquire as to the adequacy or inadequacy of the consideration; they leave the parties to form their own judgment as to this, and to make their own bargain "

The leading figure in the whole matter, in so far as the purchasing group is concerned, and the person who was very actively engaged in bringing about the sale and in preparing the numerous contracts, memoranda, and documents, was Col. Huntington, who was the only one of the purchasing group to give evidence at the trial. He was of the opinion, as expressed in his letter of 5th December 1938 to the defendant Aikens, that there was ample consideration for the issue of the bonds and that, so far as he was concerned, the whole transaction was entered upon, and was completed, in good faith. Col. Huntington stated that the purchasing group expected to make money. He was of the opinion that the bonds would be retired from the earnings of the company, and held the view that much could be expected from the Brownsville field.

A somewhat peculiar situation exists because of the fact that Col. Huntington was a witness, and the chief witness, on behalf of the plaintiff company, called by it, presumably, to aid in establishing the charge of conspiracy to injure by fraudulent means, made against the defendants. His testimony was given in a clear and straightforward manner, and the impression left with me was that Col. Huntington endeavoured to relate the details and complexities of the transaction fairly and impartially.

Col. Huntington's evidence has placed a difficulty of some considerable magnitude in the path of the plaintiff company in so far as its success in this action is concerned.

I am unable to conclude that there is that inadequacy of consideration to the plaintiff company in connection with the issue of the bonds which would establish a design to commit a fraud.

With respect to the claim that the evidence shows that a full and proper disclosure of the details of the proposed plan and its effect upon the plaintiff company was not made to the shareholders of the plaintiff company at the meeting held on the 23rd December 1938, and that the withholding of information which should have been given to the shareholders at this meeting constituted a fraud perpetrated by the defendants, who were the majority shareholders, upon the company, I cannot find that fraud, as alleged, has been shown or has been established, or that the facts assist in supporting the claim that the defendants agreed to commit a wrong upon the company.

It was held in *Menier v. Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350, that the majority of the shareholders of a joint stock company will not be permitted by the Court to commit a fraud on the minority.

Sir Richard Baggallay, in the often-cited case of *North West Transportation Company Limited et al. v. Beatty et al.* (1887), 12 App. Cas. 589, C.R. [9] A.C. 311, in the Privy Council, said:

"Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company."

In Palmer's Company Law, 17th ed. 1942, p. 156, it is stated that: "... the Court has no power to go behind the vote and to invalidate it on the ground that the shareholder had a personal interest in the subject matter different from, or opposed to, that of the company, and did not exercise his voting power for the best interests of the company." And at p. 235 Palmer says: "It

is a cardinal rule of corporation law that *prima facie* a majority of its members is entitled to exercise the powers of the corporation, and generally to control its operations."

Scrutton L.J. in *Shuttleworth v. Cox Brothers and Company (Maidenhead) Limited et al.*, [1927] 2 K.B. 9 at 23, said: "Now when persons, honestly endeavouring to decide what will be for the benefit of the company and to act accordingly, decide upon a particular course, then, provided there are grounds on which reasonable men could come to the same decision, it does not matter whether the Court would or would not come to the same decision or a different decision. It is not the business of the Court to manage the affairs of the company. That is for the shareholders and directors. The absence of any reasonable ground for deciding that a certain course of action is conducive to the benefit of the company may be a ground for finding lack of good faith or for finding that the shareholders, with the best motives, have not considered the matters which they ought to have considered. On either of these findings their decision might be set aside. But I should be sorry to see the Court go beyond this and take upon itself the management of concerns which others may understand far better than the Court does."

Applying the principles to be found in the judgments I have just cited to the facts of the present case, I am unable to find or conclude that there is any reasonable ground for deciding that the defendants, as the majority shareholders of the plaintiff company, showed a lack of good faith and did not consider the interest of the company or the matters which they ought to have considered, in authorizing the company to issue the bonds in question. I am unable to find that there was not that disclosure and not that explanation of the details and circumstances of the whole transaction given to the shareholders at their meeting, at which the by-laws enabling the transaction to be undertaken were enacted, as would permit them, as intelligent men, to obtain a sufficient knowledge of the transaction, or that the position of the defendant Aikens and of the other defendants in the transaction was not disclosed, and I find that such explanation and disclosure were given. Furthermore, I have no hesitation in coming to the conclusion that the facts did not establish an attempt on the part of the defendant shareholders to deceive the meeting. Nor can I find that the evidence proves that the

transaction, in view of the circumstances then present respecting the Brownsville field, was not in the best interests of the company, or that reasonable men could not have come to the same decision. I have already referred to the evidence of Mr. Blake. I have concluded that he was mistaken in his recollection of what happened at the shareholders' meeting, and I am unable to accept his evidence. I accept the testimony of Mr. Mungovan as to the meeting being conducted in a proper manner, that a proper vote was taken, and that he explained fully and adequately to those present the details of the proposed transaction, and I find the vote taken was unanimous. In addition to this verbal explanation the shareholders had the information furnished to them to which I have already referred. There is no evidence of a complaint having been made by a minority shareholder other than Mr. Blake.

I find that the purchasing group had received full and ample information of the physical assets and of the financial and business position of the plaintiff company and the Oxford Company, before they finally consummated the transaction. This information was secured for them by their engineers, auditors, accountants and solicitors, and was supplied by Mr. Aikens and his associates. I find that the purchasing group were aware that the total and exclusive control of the production of gas in the Brownsville field was not in the hands of the Oxford Company. The prospectus prepared by, or under the direction of, Col. Huntington, in connection with the bond issue, states that the Oxford Company had exclusive contracts with all but one of the producers in the Brownsville field. The contents of the brief prepared by the solicitors of the purchasing group and filed with the Ontario Securities Commission in connection with the bond issue sets out detailed information regarding the transaction. There is also in evidence certain correspondence which shows that the purchasing group were aware that the whole production of the field was not controlled by the Oxford Company.

The production of gas from the Brownsville field came to an end because of the seepage of water into the wells, thereby causing the flow of gas to cease, or to flow in so diminished a volume that it could not be used.

I think the fair and reasonable conclusion to be drawn from all of the evidence upon this subject is that the intrusion of water into the Brownsville field, so adversely affecting the production

of gas, was not a matter of importance until after the middle of the year 1939, and that the purchasing group were kept fully aware of the situation.

Mr. Moulton's report of the 9th November 1938, to which reference has already been made, does not speak of trouble caused by, or likely to be caused by, water.

On the 13th January 1939 Mr. Aikens sent a copy of a report made by Mr. Herbert R. Davis, a gas engineer, to Col. Huntington. This document is a very extensive report upon the Brownsville field, dated the 10th December 1937 and made for the Atoka Oil Company Limited, of which Capt. L. W. Adams was president. The report states that "water intrusion seems to be out of the question".

In May 1939 the defendant Aikens reported to Col. Huntington that several wells were showing water. In February 1940 there was some apprehension on the part of some of the purchasing group as to the harmful result caused by water to the production from the field, due to the improper operation of wells controlled by one R. L. Pattinson of the Central Pipe Line Company. On the 4th March 1940 Mr. Moulton reported that many wells were affected by the intrusion of water, and that the future of the field did not appear as satisfactory as in the year 1938. He referred to the operations carried on by the Central Pipe Line Company.

I have already referred to the law respecting conspiracy, as laid down in *Sweeney v. Coote, supra*, and I also referred to that case in giving judgment dismissing the action against certain of the other defendants, and now applying that law to the facts as disclosed by the evidence, with respect to the present defendants, I find that a conspiracy as alleged by the plaintiff company has not been established against the defendants William J. Aikens, Edward J. Aikens and William T. Henderson, either in their capacity as executors or as individuals, nor against the defendant Thomas M. Mungovan, and that no such conspiracy existed. I find that fraud, or an intention to deceive, is not shown by the evidence, on the part of the defendants in the roles played by them, or any one of them, in the whole transaction.

Assuming that the action is not founded solely upon the allegation of conspiracy, and that the pleadings set up a distinct claim for damages based upon a violation of fiduciary duties owed

by the defendants to the plaintiff company, I do not think the evidence, as it affects the defendants, either as executors or as individuals, leads to any different conclusion than that which I arrived at in giving judgment dismissing the action against the defendants Dougher and Martin during the course of the trial [see end of report]. I there referred to the law as discussed in *Dovey et al. v. Cory*, [1901] A.C. 477, and in *Re Owen Sound Lumber Co.* (1915), 34 O.L.R. 528, 25 D.L.R. 812, affirmed on this point (1917), 37 O.L.R. 414, 33 D.L.R. 487, with respect to the obligations of a fiduciary nature cast upon the directors of a joint stock company. I find that there was not a breach of trust on the part of the defendants W. J. Aikens or Thomas Mungovan, as directors or officers of the plaintiff company. The defendants E. J. Aikens and W. T. Henderson were never directors or officers of the company.

In *Hyatt v. Allen* (1914), 26 O.W.R. 215, 17 D.L.R. 7, 30 T.L.R. 444, in the Privy Council, Viscount Haldane said that the duty of directors is primarily one to the company itself, but that directors may hold themselves out "to the individual shareholders as acting for them on the same footing as they were acting for the company itself, that is as agents". The evidence does not support the view that the directors of the plaintiff company held themselves out to the individual shareholders as the agents of such shareholders, but assuming that the directors did hold themselves out as agents for individual shareholders, there is no evidence of a complaint on the part of any of the shareholders of the acts of the majority, other than that of Harry F. Blake, who offered no objection to the transaction at the meeting of shareholders.

With reference to the question as to whether the action is in reality one on behalf of the purchasing group, it was contended by Mr. Mason that although the plaintiff company and the Transadian Company may be nominally separate entities, the fact is that, for all practical purposes, these two companies were in reality merged, the plaintiff company being part of the Transadian Company, acting merely as its agent and subject in all things to its direction. It was argued that the principle stated by Middleton J.A. in *Patton et al. v. Yukon Consolidated Gold Corporation Ltd. et al.*, [1934] O.W.N. 321, [1934] 3 D.L.R. 400, and in the cases to which reference was made, should be applied to the case at bar.

There are certain findings of fact which, I think, should be made relating to this branch of the case, and with respect to which there is little controversy.

On the 19th May 1939 the Transadian Company became the registered holder of 18,903 shares of the 30,801 issued shares of common stock of the plaintiff company. On the 2nd February 1942 a meeting of the board of directors of the Transadian Company was held, at which Messrs. Still and A. F. Milton were present as directors, and Mr. Lloyd F. Thanhouser was in attendance. At this meeting Mr. Aikens resigned as president of the Transadian Company and Col. Huntington resigned as a director. Mr. Still was elected president and Mr. Thanhouser a director. A resolution was presented to the meeting and passed to the effect that all claims of the Transadian Company against former shareholders of the present plaintiff company, including the executors of the W. J. Aikens Estate, arising from the sale by them of securities of the plaintiff company and the Oxford Company, be referred to solicitors for their opinion, and that the officers of the company be authorized to take such action as might be advised by their solicitors. The defendant Aikens voted against the resolution, and Mr. Thanhouser did not vote.

On the 7th July 1942 the directors of the plaintiff company, consisting of Messrs. Still, A. F. Milton, and Thanhouser, and Messrs. Hood and Taylor, of the firm of Osler, Hoskin & Harcourt, solicitors for the purchasing group, passed a resolution, respecting proposed action to be taken against former directors, officers and shareholders of the plaintiff company, which is identical in language with the resolution already mentioned, passed by the directors of the Transadian Company. Although action against the former majority shareholders of the plaintiff company was contemplated by the directors of the Transadian and plaintiff companies, no mention was made of the litigation, which had been commenced on the 31st December 1942, at the meetings of shareholders of the plaintiff company held on the 27th July 1943 and on the 13th June 1944.

On the 4th December 1944 the Transadian Company held 20,870 shares of the plaintiff company, as well as \$81,500 "A" bonds, \$47,000 "B" bonds and \$24,100 "C" bonds of the plaintiff company.

I find that at the time this action was instituted the control of the plaintiff company was solely and entirely in the hands of the purchasing group, through the Transadian Company. The bondholders,, consisting of the Transadian Company and those holding bonds through that company, except with respect to the few bonds held by the defendant Aikens and several minority shareholders of the plaintiff company, would be entitled to be satisfied first out of the proceeds of any damages recovered by reason of this action.

Col. Huntington and the defendant Aikens both gave evidence to the effect that Mr. Greenspau suggested that the Aikens Estate pay back some of the amount which the estate received for its shares in the plaintiff company, not to the plaintiff company, but to the Transadian Company.

Mr. Mason, during the course of his very able argument, took the position, on this branch of the case, that he was supported by the judgment of Middleton J.A. in *Patton et al. v. Yukon Consolidated Gold Corporation Ltd. et al.*, *supra*, and the cases therein discussed. In that case the defendant Treadgold, the president and a director of the Yukon company, sought to justify his acts in making a secret profit in his dealings with the company, on the ground that the acts impeached were not his own but were those of another company which was a separate entity, but which, the evidence established, was wholly owned and controlled by him. The Court held that the defendant could not escape the consequences of his misdeeds on that ground, and Mr. Justice Middleton referred to and discussed *Salomon v. A. Salomon and Company Limited*, [1897] A.C. 22, also the judgment of Lord Buckmaster in *Rainham Chemical Works, Limited et al. v. Belvedere Fish Guano Company, Limited*, [1921] 2 A.C. 465, where it was said:

“A company, therefore, which is duly incorporated, cannot be disregarded on the ground that it is a sham, although it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence.”

The *Patton* judgment also made reference to *Daimler Company, Limited v. Continental Tyre and Rubber Company (Great Britain) Limited*, [1916] 2 A.C. 307, and *The Palmolive Manufac-*

turing Company, (Ontario) Limited v. The King, [1933] S.C.R. 131, [1933] 2 D.L.R. 81, in the former of which cases it was said by Lord Parker of Waddington that "... great judges trained in the principles of the English common law, have not found it contrary to principle to look, at least for some purposes, behind the corporation and consider the quality of its members."

In the *Palmolive* case, where the matter involved two separate companies, it was held that while the two companies were separate legal entities yet in fact and for all practical purposes they were merged, one being a part of the other, acting merely as its agent and subject in all things to its proper direction and control. Counsel referred also to the appeal in the Privy Council of *Part Cargo ex M. V. Glenroy; H.M. Procurator-General v. Spencer*, [1945] A.C. 124, where the question of the control of one company by another is discussed.

Because of the conclusion I have reached that the evidence does not uphold the allegations made by the plaintiff company in its pleadings, and that the action therefore on that account alone should be dismissed, I do not consider it necessary to discuss further this second question, or to reach a determination with respect thereto.

Neither is it necessary to consider the argument advanced on behalf of the defendants that the plaintiff company, by its act in approving of the supplementary bond mortgage, was thereby estopped in attacking the whole of the previous transaction.

The action as against all of the defendants is dismissed with costs.

Action dismissed with costs.

NOTE: As stated in the above reasons, motions were made, at the close of the plaintiff's case, for the dismissal of the action as against some of the defendants. These motions were disposed of for reasons delivered orally, as follows:

11th December 1945. HOGG J. (dealing with the motion on behalf of the defendants Dougher and Martin, after summarizing the allegations in the statement of claim):—Both the defendants Dougher and Martin were directors of the plaintiff company when by-laws 5 and 6, instituting and carrying into effect the alleged fraudulent scheme of the issue of bonds of the plaintiff

company, and the borrowing of \$85,000, were passed by the directors and shareholders of the company.

It is contended on behalf of the plaintiff that their part in the alleged wrongful acts and the conspiracy was that they committed a breach of trust in voting to pass the said by-laws, both as directors and as shareholders, because through their negligence they did not make such enquiries as reasonable business men should in order to ascertain whether the plan proposed was a proper and not a wrongful one, and that if they had done so, and had not been negligent, they would have discovered that the plan was illegal and fraudulent.

As Mr. Walker put the matter, if Dougher and Martin had made proper enquiries they never should have done what they did. It is argued that they should not have relied upon Aikens's explanation, that they gave the matter no study, and that they failed to act as directors should act.

It is also argued that both these defendants, because they did not act as they should have acted, therefore, became involved in the alleged conspiracy.

As I read the statement of claim, the plaintiff's case against the defendants is that they became members of a conspiracy to defraud, and that so far as these two defendants are concerned they were in the conspiracy, or abetted it, because they were negligent in fulfilling their duties as directors.

One of the matters in which the plaintiff company was interested, and part of the general plan under which the issue of bonds was made (to which I shall refer as an example only, without now discussing the bond issue, because it was one of the circumstances stressed by Mr. Walker), was the outlet for its natural gas. The pipe-line no. 2, referred to in evidence, was necessary. Mr. Walker says that \$85,000 extra funds were not necessary to establish this line, as some \$56,000 had already been expended upon it. But the evidence seems to establish that this \$56,000-odd had been borrowed to put into the pipe-line, and this would have to be repaid, along with a further sum necessary to complete the line.

Mr. Walker further argues that the \$85,000 was not necessary to obtain access for the plaintiff's gas to the outlet provided by the contract with the Gypsum Company, and that the defendants in question should have known this.

I do not think it could be said that this action on the part of these defendants, in assuming that the \$85,000 in question was a necessary or proper sum in respect of this pipe-line, shows negligence or breach of trust.

In approaching this issue one must realize that both of the defendants were witnesses called to give evidence in support of the plaintiff's claim. They were not what are termed "hostile" witnesses. Both of these witnesses testified that they thought their actions were in the best interests of the company.

The plaintiff is in the position of asking me to find that the evidence of its own witnesses, though they were not hostile, is not to be accepted. That imposes a grave burden upon the plaintiff.

However, it is argued on behalf of the plaintiff company that the action is not founded on conspiracy alone, and that the statement of claim sets up a claim for damages for breach of trust due to the negligence of the defendants as directors of the company, apart from the allegation of a conspiracy.

Assuming that such a claim is set up by the plaintiff's pleadings, I have taken occasion to look at several of the cases on this subject. In *Re Owen Sound Lumber Co.* (1915), 34 O.L.R. 528, 25 D.L.R. 812, affirmed (1917), 38 O.L.R. 414, 33 D.L.R. 487, in the Appellate Division, the question of the liability of directors of a company is discussed at length in the judgment of Hodgins J.A. At the trial, Middleton J. was of the opinion that more than honesty is required of a director, that reasonable intelligence and diligent attention to business are also essential. In referring to this opinion Hodgins J.A. said that while the evidence disclosed just the usual perfunctory and half-interested attention which the business of a company managed by some one else always gets, and that it might show neither reasonable intelligence nor diligent attention, it could not be regarded as indicating either wilful blindness or that absence of care or discretion which would render directors liable for misfeasance.

The judgment in the leading case of *Dovey et al. v. Cory*, [1901] A.C. 477, was referred to by Hodgins J.A., where the Lord Chancellor, at p. 485, said:

"The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or

the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible."

The same reasoning would seem to apply where the matter is presented to the directors by a principal officer and shareholder of an incorporated company.

As to the evidence of Dougher: It is somewhat difficult at present to visualize the mental and physical condition of this defendant as it probably was in 1938 and 1939. He said that he did not understand the plan or scheme proposed by the by-laws, but thought they were in the best interests of the company.

We are not primarily concerned at the present moment with the question whether the outcome was disastrous as a result of the plan or scheme, or because of water getting into the field; we are merely concerned now with whether Dougher and Martin did what reasonable men would not do in their position of directors; that is, whether they committed a breach of trust, and whether they furthered the alleged conspiracy. The damage must be caused by some wrongful act on the part of these defendants; and the only wrongful act alleged by the statement of claim, as I understand that pleading, is that they abetted a conspiracy.

Dougher, who is 75 years of age, is not of vigorous mentality, nor is his memory good. As Mr. Martin said, Dougher has changed in the past few years. He cannot now say what was discussed at the meetings in question: "I was there, but I don't remember what was discussed." But he does remember that he was not influenced by anyone to do anything improper, and that he listened to the explanations given. There seems to be no reason why he should have suspected that he was being given false or wrongful information.

After careful consideration of this man's evidence, I cannot conclude that at the time of the meetings in question Dougher did not act as an honest, though possibly dull and not mentally alert, man would under the circumstances, finding himself a director on a board, or that he can be held to be guilty of negligence that would make him liable, in approving of the scheme

or plan under which the bonds were issued. It is true that he wished to be bought out, but the evidence does not show that this motive caused him to act illegally—even if motive has anything to do with the case. There is no evidence which connects this defendant with a conspiracy, nor is there evidence of fraud on his part.

As to the defendant Martin: He impressed me as a man whose evidence was to be accepted. His testimony was given in a straightforward and intelligent manner. He appears to have had a very considerable and intimate knowledge of the business in which his company was engaged, and knowledge of what the whole deal or plan was about, and he remembers many matters that were discussed at the meetings. He said that an explanation of the scheme of the issue of the bonds, and the borrowing of the \$85,000, was given. He said that from his previous knowledge of the business of his company he was satisfied that the plan was a good one.

I am of the opinion, from this defendant's evidence, that he had a very considerable knowledge of the whole business, and I think he honestly concluded there would be very profitable earnings when the new pipe-line was in operation. He said that he exercised his own judgment in respect of the whole scheme or plan, and was not controlled. He said he had no reason to doubt the explanations which were given to him.

I cannot conclude that the defendant Martin by any act, or any neglect to act on his part, demonstrated that he did not approach this matter as an honest and reasonable man would do, or that he acted in such a manner that he could be held to be guilty of negligence amounting to a wrong, or to have taken part in an illegal and wrongful conspiracy. There is no evidence of fraud on his part.

In order that a conspiracy be shown, there must be shown an intentional participation in the act, with a view to the furtherance of a common design. There is no evidence that there was the intentional participation of either of these defendants in this transaction with a view to the furtherance of a common plan.

To establish a claim for conspiracy against a defendant there must be shown more than his mere knowledge of, or acquiescence in, the furtherance of a common plan; there must be shown an intentional participation in the act, with a view to the furtherance of a common design.

Motive does not constitute an element of civil wrong: Lord Watson in *Allen v. Flood et al.*, [1898] A.C. 1.

In view of the above, I am dismissing the action as against Dougher and Martin, with costs.

12th December 1945. HOGG J.:—Motions have been made by counsel for non-suit, or that the action be dismissed, with respect to the following defendants, namely: the estate of Mrs. Victoria Henderson, the estate of Lee W. Adams, Charles Wilson, Mrs. R. E. Lawrie, Miss Mary L. Fairall, and Roy F. Richards.

I have already discussed, although in somewhat brief terms, in the reasons given for dismissing the action against the defendants Dougher and Martin, my understanding of the nature of the wrongdoing as pleaded, upon which the plaintiff bases its claim for damages.

I may say that no doubt this action will not stop here; the matters involved are of very considerable importance, and the amount claimed is a very large one; therefore, I am assuming now to enlarge somewhat upon the remarks I made yesterday with reference to my understanding of the pleadings, in the hope that it may be of some assistance to the appellate tribunal if the case goes further, as I should imagine it would.

I have come to the conclusion that the action as pleaded is solely one of conspiracy.

Counsel for the plaintiff company has very ably and forcibly argued that para. 49 of the statement of claim raises another cause of action besides one of conspiracy, and that this paragraph enables the Court to determine whether damages have been caused to the plaintiff company because of breach of trust through wrongful acts on the part of each of the defendants, apart from the allegation that they were parties to a conspiracy. If the sole cause of action, as is set out in para. 17 of the statement of claim, is that all of the defendants entered into, aided and abetted a scheme and conspiracy which was wrongful and fraudulent as against the plaintiff company, then I could not conclude that the evidence as against the defendants concerned in these motions establishes those elements which are essential in the proof of a civil conspiracy to defraud, and by so doing cause injury and damage. I am unable to hold that the acts of any of these defendants come within the limits of the law as laid down in *Sweeney v. Coote*, [1907] A.C. 221. It was not estab-

lished that there was an intentional co-operation in a wrongful transaction or a common scheme. The defendants in question were not, in my opinion, persons who, as was said in *Read v. The Friendly Society of Operative Stonemasons of England, Ireland and Wales et al.*, [1902] K.B. 732, acted in concert knowingly, and for their own ends induced the commission of an actionable wrong, and employed illegal means to bring about such wrong. In brief, a conspiracy has not been proved as against any of these defendants.

I should like, however, to consider the effect of paras. 17 and 49.

Para. 17 deals exclusively with an alleged conspiracy in which all of the defendants participated. I am now reading such portions of para. 17 as to my mind are essential:

"In or about the month of August, 1938, the defendant Executors and the defendants William J. Aikens and William T. Henderson, individually, made, entered into and participated in a plan, scheme and conspiracy . . . and each and all of the defendants . . . made, entered into, participated in, aided and abetted said plan, scheme and conspiracy . . . Said plan, scheme and conspiracy and the execution thereof, as hereinafter alleged [—one must note particularly those words "as hereinafter alleged"—] were wrongful and fraudulent as to the Plaintiff and contrary to its best interests, and were in violation of the fiduciary duties and obligations which the defendants . . . owed to Plaintiff, as its majority stockholders, directors and/or officers."

It is to be noted there that the conspiracy pleaded was one "contrary to the best interests [of the company, and] in violation of the fiduciary duties and obligations which the defendants owed to Plaintiff".

Para. 49 commences with the words: "By reason of the foregoing", and the paragraph goes on to say that "Plaintiff . . . has suffered damages . . . through the wrongful and fraudulent acts of the defendants and the violations by them of their respective fiduciary duties and obligations . . . as hereinabove alleged". We find the "violations of fiduciary duties as hereinbefore alleged", is a conspiracy set out in para. 17.

In my view, the defendants were called upon, by these pleadings, to meet solely a charge of conspiracy which was claimed to be a violation of the fiduciary duties of the defendants,

and that if a separate and distinct claim is intended to be set up, the language in which it is pleaded is too vague.

For the aforementioned reasons, I must conclude that the action as against all these defendants fails.

However, (and again because this action, in my mind, will no doubt go further) I have given some consideration, although in my view not called upon to do so in view of the conclusion arrived at, as to the contention that, apart from the charge of a conspiracy, the separate acts of each defendant may be held, if wrong and fraudulent and in violation of the duties owed by the several defendants as trustees, to have caused injury to the plaintiff company.

The first question is: Can each of these defendants be said to have acted wrongfully in this respect?

With regard to the late Mrs. Henderson, the evidence shows that she gave a proxy to be used respecting her holding of shares. Para. 20 has been referred to by counsel for the plaintiff as one of those setting out the allegations made against her. Para. 20 says this:

"The agreements described in the preceding paragraph hereof were carried out and performed at times, to the extent and in the manner hereinafter more particularly alleged. Said agreements were entered into for the private advantage, benefit, profit and gain of the Aikens Estate and the defendant Executors thereof and the defendants William J. Aikens and William T. Henderson individually, and the defendant Victoria Henderson." That is, these agreements were entered into for the private advantage, benefit, profit and gain of these people. "Said agreements, as the defendants well knew, were contrary to the best interests of the Plaintiff." That is the main allegation against her.

It is said by Palmer on Company Law—it is true it is an old edition (1898), p. 113, but I think the law as stated still holds good—that a shareholders' vote is a right of property which he may use as he pleases. The propriety or impropriety of his motive is immaterial; he is entirely free to exercise his own judgment as to how he shall vote, and the Court has no power to go behind the vote and to invalidate it on the ground that the shareholder had a personal interest in the subject matter different from or opposed to that of the company, and did not

exercise his voting power for the best interest of the company, although a majority of the members will not be allowed to vote to commit a fraud on the minority.

This reference to a fraud on the minority is the subject of the case of *Menier v. Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350, referred to by Mr. Walker. I have a very brief remark to make later on as to this judgment.

Para. 20, in my view, sets out no ground for action. The plaintiff's whole action against Mrs. Henderson is that she gave her proxy—that is, the plaintiff's whole case is that she gave a proxy with respect to her shares to one who thus became her agent, and that as agent he acted within the scope of his authority, and she is, therefore, responsible as principal for the wrongful and fraudulent acts of this agent.

It seems to me that here is a matter raised outside of the pleadings, which this defendant cannot be forced to answer. In other words, we have no proof, at the present state of this trial, that her agent is liable for a wrongful act. That question cannot be determined until his defence is heard, and the whole of the evidence is concluded. The evidence does not make out a *prima facie* case against the late Mrs. Henderson.

With reference to the defendants Wilson, Mrs. Lawrie, Miss Fairall and Richards. It is contended that they violated their trusteeship, and acted wrongfully as directors of the company. The contention is that they were dominated by the defendant Aikens and did what they were told to do by him; that their salaries were paid by Aikens and they acted as he wished without making any proper enquiry as to the effect of the acts they were supporting as directors and shareholders of the company.

There is no direct evidence that these defendants were induced to do a wrongful act by anyone. I am asked to draw an inference that these directors committed a fraud and breach of trust because these defendants were merely what are sometimes termed "dummy" directors; because their salaries were paid in whole or in part by Aikens; because they were made directors merely because he wished them to be directors, and ceased to be directors when he wished them to resign.

I cannot draw such an inference from the evidence which is before me, and I here refer to the remarks I have made on this subject in my reasons for judgment given on the motion made by the defendants Dougher and Martin.

However, there remains for consideration the charge against these defendants, that they were part of the majority shareholders, and as such they committed a fraud on the minority shareholders, contrary to the principle laid down in the *Menier* case. I have not yet had an opportunity to read this judgment, but assume this was a class action brought by some shareholder, or shareholders, on behalf of certain other shareholders against the company. Here we have an action brought by the company itself, not by or on behalf of minority shareholders. I may be wrong, as I have not seen the *Menier* case, but the reference in Palmer leads me to think that the action was a class action on behalf of minority shareholders themselves, not on behalf of the company.

In so far as Adams is concerned, the charge is that he violated his trust and acted wrongfully as a director at the instigation of certain of the other defendants. He is charged with being influenced, and of voting at the shareholders' meeting in favour of the plan attacked as being fraudulent, because he received a certain number of shares, some from the defendant Aikens, and because he received an interest in an exploration company, also because he was made a director before the meeting which approved of the scheme, then dropped from the board after having received 400 shares; also because he was not independent.

I am asked to draw an inference that because of these circumstances he must have acted fraudulently, and in violation of his trust. He is not here to answer for himself, and the statute requires strict corroboration. This is one case where inferences are only to be drawn if the circumstances show that there could be no other conclusion but that fraud was committed. I can not hold that there is any evidence to establish this charge of fraud, and breach of trust.

That same principle would also apply in the case of Mrs. Henderson.

The question of Adams voting at the shareholders' meeting comes within the remarks I have made with reference to the votes of majority shareholders.

The action is dismissed as against the defendants the estate of Victoria Henderson, the Adams estate, Wilson, Lawrie, Fairall and Richards, with costs.

Solicitors for the plaintiff: Blake, Anglin, Osler & Cassels, Toronto.

Solicitors for the defendant executors: Mason, Foulds, Davidson & Gale, Toronto.

Solicitor for the defendant Dougher: Leo J. Leavey, Dunnville.

Solicitors for the defendant Martin: Mewburn, Marshall & Jefferess, Hamilton.

Solicitors for the defendant Richards: Aylesworth, Garden, Stuart & Thompson, Toronto.

Solicitor for the other defendants: Thomas M. Mungovan, Toronto.

[COURT OF APPEAL.]

Applebaum v. Gilchrist.

Husband and Wife—Causes of Action against Third Persons—Whether Wife Entitled to Sue for Damages for Enticement and Loss of Consortium—History of Legislation—The Married Women's Property Act, R.S.O. 1937, c. 209, s. 3(1).

A married woman in Ontario is entitled to sue another woman for damages for wrongfully enticing and procuring the plaintiff's husband, without her consent and against her will, to cease cohabiting and consorting with her, whereby she loses the husband's society and services. The modern English decisions should be followed in holding that what is now s. 3(1) of The Married Women's Property Act has removed the procedural difficulty in the way of bringing such an action, and that, this procedural difficulty having been removed, the cause of action, which exists at common law, is enforceable in the courts. *Lellis v. Lambert* (1897), 24 O.A.R. 653, distinguished; *Talmage v. Talmage* (1928), 62 O.L.R. 209; *Barks v. Done*, [1933] O.R. 784, affirmed [1933] O.W.N. 822, not followed; other authorities reviewed.

AN APPEAL by the plaintiff from an order of Schroeder J., dismissing the action. The facts are stated in the reasons for judgment.

7th May 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

Nathan Phillips, K.C., for the plaintiff, appellant: The judge below held that the action was barred, by reason of binding authority. The leading decision is *Lellis v. Lambert* (1897), 24 O.A.R. 653, which overruled *Quick v. Church* (1893), 23 O.R. 262, and which has been twice followed by the Court of Appeal, in *Weston v. Perry* (1909), 1 O.W.N. 155, 14 O.W.R. 956, and *Barks v. Done*, [1933] O.W.N. 822, [1934] 1 D.L.R. 789, affirm-

ing [1933] O.R. 784, [1933] 4 D.L.R. 540; see also *Talmage v. Talmage*, 62 O.L.R. 209, [1928] 3 D.L.R. 15; *Lawry v. Tuckett-Lawry* (1901), 2 O.L.R. 162.

In all these later decisions *Lellis v. Lambert* has been considered a binding decision to the effect that a wife cannot sue, in Ontario, for alienation of affections, criminal conversation, or enticing a husband to leave. It is submitted that it is not a compelling decision to this effect, and that the subsequent judgments are not binding on this Court, for the following reasons:

The Married Women's Property Act in effect at the time *Lellis v. Lambert* was decided (R.S.O. 1887, c. 132), provided, in s. 3(2) that a married woman should be capable "of suing and being sued, in all respects as if she were a *feme sole*". The Court construed this as limiting her right to sue to injuries to her separate property, and as not giving her a general right to sue and be sued in the same way as a *feme sole*. By 1913, c. 29, s. 4(2), the Act was made to conform in this respect to the original English wording, and now appears in that form as s. 3(1) of R.S.O. 1937, c. 209. In 1926, by c. 44, s. 4 was divided, and what had been subs. 2 became an entirely separate section. This makes the reasoning of Burton C.J.O. in *Lellis v. Lambert* obviously inapplicable.

The English cases and text-writers are unanimous in allowing an action for enticement under the English statute, and such an action was recognized by Parliament as existing at common law by s. 1(1) of The Law Reform (Miscellaneous Provisions) Act, 1934 (Imp.), c. 41.

The later Ontario cases do not deal with the change in the wording of the Act, or with the narrow and now discredited view of the right to sue taken in *Lellis v. Lambert*. Although the Court is generally bound by its own former decisions, this is not the case where those decisions have ignored relevant statutory enactments, or the attention of the Court has not been directed to all the relevant statutory or judicial authority: *Rex v. Eakins*, [1943] O.R. 199, [1943] 2 D.L.R. 543, 79 C.C.C. 256; *In re Shoesmith*, [1938] 2 K.B. 637; *Young v. Bristol Aeroplane Company, Limited*, [1944] K.B. 718 at 729.

Further, *Lellis v. Lambert* was not founded upon enticement which would, in the case of a husband, have founded an action. All that was actually decided in the case was that a wife had no right to sue for criminal conversation. Maclellan J.A., at p.

670, said that an action might lie for depriving a wife of *consortium* by assault, or by imprisonment of the husband. It would seem to be immaterial whether a defendant's conduct was tortious with respect to the husband. The issue is whether the wife has a right which is protected against the defendant's conduct, or whether the defendant's conduct is tortious as against her.

The Court in *Lellis v. Lambert* was of opinion that certain dicta in *Lynch v. Knight et ux.* (1861), 9 H.L. Cas. 577, 11 E.R. 854, indicated that a wife had no right to damages resulting from any conduct depriving her of the society of her husband. This view has been discredited in the later English decisions, particularly *Gray v. Gee* (1923), 39 T.L.R. 429; *Newton v. Hardy et al.* (1933), 149 L.T. 165, 49 T.L.R. 522. It has also been departed from in *Sheppard v. Sheppard* (1922), 51 O.L.R. 520, 69 D.L.R. 570.

[ROBERTSON C.J.O.: There is a question here that is more fundamental than that of the right to sue. It is the question what rights the plaintiff had that have been infringed.]

Since *Lellis v. Lambert* is distinguishable on the grounds stated, and later cases have merely followed it, without a re-examination of the true problem presented by the statute and the later English case law, the question is still open in this Court. The Court is therefore faced with the problem of deciding whether a husband's acknowledged right of action for enticement depends upon control of his wife as a chattel, or whether the right to *consortium*, in the light of the changes made in the statute, are mutual and identical in both husband and wife. We adopt in its entirety the dissenting opinion of Isaacs J. in *Wright v. Cedzich* (1930), 43 C.L.R. 493 at pp. 500 *et seq.*, particularly pp. 506, 509. While the majority of the Australian Court in that case decided against the right of a wife to maintain such an action as this, the English Court in *Newton v. Hardy et al.*, *supra*, refused to follow that case.

We also rely on the reasoning in *Quick v. Church*, *supra*, which, it is submitted, was overruled on an erroneous view of the statute. To deny the plaintiff's right of action in this case is to affirm the view of Blackstone, cited in *Quick v. Church*, that a husband has such a right of action because he is the "superior", suing for loss of an "inferior". Even if such a view may have been justifiable under the statute as it stood in 1895,

the present Act, and its interpretation both here and in England, has made such a theory impossible under present conditions: *Reg. v. Jackson*, [1891] 1 Q.B. 671.

The argument of Osler J.A. in *Lellis v. Lambert*, *supra*, at p. 662, that a wife always has a right of action against her husband for support, while a husband has no corresponding action against her, might seem to require different treatment of a wife. But in cases on inducing breach of contract the plaintiff always has a cause of action against the other contracting party, and this has not prevented the application of the principle that he is entitled to sue the person who has induced the breach. At the date of *Lellis v. Lambert* the sweeping generality of the "inducing" cases had not been fully recognized.

It is not correct to say, as the judge below did, that there is no distinction between a cause of action for enticement and one for alienation of affections.

C. F. H. Carson, K.C. (O. S. Hollinrake, K.C., with him), for the defendant, respondent: There are only two English cases cited by the appellant where this question has arisen directly, and both of them are decisions at trial. In neither of them is there any analysis of the effect of The Married Women's Property Acts.

It is abundantly clear that no such cause of action as is here set up existed at common law, and the question in *Lellis v. Lambert*, *supra*, was whether the Act had created such a right of action. It is the only case in which the Court has analyzed the Act to determine that question.

In *Talmage v. Talmage*, 62 O.L.R. 209, [1928] 3 D.L.R. 15, Middleton J.A. traced the whole question of a wife's right to sue for alienation of affections back for 70 years. [LAIDLAW J.A.: Is there not a distinction between an action for enticement and one for alienation?] No; the words "alienation of affections" appear to be a label introduced by the American courts. The question was considered in *Bannister v. Thompson* (1914), 32 O.L.R. 34, 20 D.L.R. 512; alienation is the means used to entice away a spouse. [ROACH J.A.: It does not follow, because the damages flowing from one act are the same as those flowing from the other, that there is no distinction between the two.] Even in cases where a husband has been enticed away, the courts have pointed out that the wife has suffered no money damage.

Lellis v. Lambert shows clearly why the husband alone had such a cause of action at common law. If anything, the statute in its present form is a little narrower than as it was when that case was decided. Not much importance is to be attached to the renumbering of the sections. [ROACH J.A.: Does it not come to this, that in order to support this action one must concede to a married woman rights which she did not have either at common law or when *Lellis v. Lambert* was decided?] That is our submission, and those rights can be given only by statute.

The cases as to inducing a breach of contract are inapplicable. There is a distinction between an ordinary contract and a marriage contract: 6 Halsbury, 2nd ed. 1932, p. 286; *Mordaunt v. Mordaunt, Cole, and Johnstone* (1870), L.R. 2 P. & D. 103 at 126. Lush on Husband and Wife is the only text-book which puts such an action as this upon the principle of such cases as *Lumley v. Gye* (1853), 2 E. & B. 216, 118 E.R. 749, and *Quinn v. Leathem*, [1901] A.C. 495.

The Act gives a married woman a right to sue "as if she were a *feme sole*". Obviously, no *feme sole* would have any such cause of action as this.

The reasoning in *Lellis v. Lambert*, and the cases which followed it, is sound, and should not now be departed from. We refer also to *Butterworth v. Butterworth and Englefield*, [1920] P. 126, and *Lynch v. Knight et ux.* (1861), 9 H.L. Cas. 577, 11 E.R. 854.

Nathan Phillips, K.C., in reply: As to the distinction between enticement and alienation of affections, see Prosser on Torts, 1941, pp. 916 *et seq.*, particularly p. 921; 30 Corpus Juris, 1923, pp. 1118, 1123.

Cur. adv. vult.

30th September 1946. ROBERTSON C.J.O.:—This is an appeal from the order of Schroeder J., dated 28th March 1946, by which he dismissed the action, with costs. The appellant, a married woman, brought this action against another woman for damages for wrongfully enticing and procuring the appellant's husband, without the consent and against the will of the appellant, to cease cohabiting and consorting with the appellant, whereby she lost her husband's society and services. The respondent, by her statement of defence, denied the allegations made against

her, and further pleaded that the facts alleged in the statement of claim did not disclose a cause of action in law.

A motion was made on behalf of the respondent for the determination of the question of law raised by her on the pleadings, and for an order striking out the statement of claim and dismissing the action. The motion came on before Schroeder J., who granted the motion, holding, but without giving reasons in writing, that the facts alleged in the statement of claim gave the appellant no legal right of action. It is from this order that the appeal is taken.

I have had the privilege of reading the reasons for judgment prepared by my learned brothers Laidlaw and Roach, who have reached opposing conclusions. I agree in the result arrived at by LAIDLAW J.A., but, as I have not arrived at that result in quite the same way, I should state my own views.

There is no dispute that a husband has a right of action against one who, unjustifiably, deprives him of the *consortium* of his wife by enticing her away and by procuring her to reside and consort with him. While this right of action on the part of the husband has, at times, been rested upon his loss of his wife's services in his home (see *per* Lord Wensleydale in *Lynch v. Knight et ux.* (1861), 9 H.L. Cas. 577, 11 E.R. 854), it has become firmly established that loss of *consortium* alone will give the husband a right of action: *Winsmore v. Greenbank* (1745), Willes 577, 125 E.R. 1330; *Place v. Searle*, [1932] 2 K.B. 497. The later decisions in England also support the right of a wife to maintain a similar action.

It cannot be said that the decided cases in this Province clearly support the right of a married woman to bring such an action. The weight of authority, so far as reported decisions go, would seem to be the other way.

In the case of a wife, there was, until comparatively recent times, both in England and here, a procedural difficulty in the way of bringing such an action. She could not bring the action alone. Her husband must be joined with her as a plaintiff. "During coverture the wife has no such existence as to enable her to be a suitor in her own right in any court": *per* Erle C.J. in *Capel v. Powell et al.* (1864), 17 C.B.N.S. 743 at 748, 144 E.R. 298. It is difficult to conceive that a husband would consent to join as plaintiff in such an action brought by his wife, and there is not, so far as I have discovered, any report to be

found of such an action having been brought by husband and wife. So long as that procedural difficulty remained, it is not difficult to understand why there were no precedents for such an action by a married woman.

This procedural difficulty was removed in England by The Married Women's Property Act of 1882, 45 & 46 Vict., c. 75. Section 1 (2) of that Act is as follows:

"A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

This provision permitting a married woman to sue and to be sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, was a procedural change only, and gave to a wife no new cause of action. In *Weldon v. Winslow* (1884), 13 Q.B.D. 784, 53 L.J.Q.B. 528, where a married woman brought an action in her own name to recover damages for libel, trespass and assault, and objection was made that the cause of action had arisen before the Act came into operation, and that to permit a wife to sue alone would be to make the Act retrospective, Brett M.R., observing the established rule that there are no vested rights in procedure, said: "It is said that such a construction will give retrospective effect to the Act, because it is said that the cause of action arose before the Act came into operation. But, although it did then arise, there is nothing in the Act about causes of action, but only about procedure." In the same case, Bowen L.J. said: "The present case seems, in principle, to fall within that class of statutes which deals with procedure rather than with vested rights, and which ought so to be construed as not to affect those rights."

In *Edwards et al. v. Porter*, [1925] A.C. 1 at 37, Lord Sumner, in discussing this statutory provision, referred to it as a "procedural provision". He said further: "Turning now to the

substance of the sub-section, it is evident that the married woman gains her liberty in litigation on the terms of the same liberty being given to those who wish to sue her. If she is to be enabled to sue them single-handed, they are to be enabled to sue her by herself".

It is important to keep in mind the strictly procedural character of the change made in England by this provision of the Act of 1882. It gave to a married woman, in broad terms, the right to sue alone. It did not give her any new cause of action. She was given the right to sue without joining her husband, but only upon such causes of action as she might have independently of this provision.

The grant to a married woman of the right to sue alone in the courts of this Province has had a somewhat different development. While The Married Women's Property Act of 1882, passed in England, was adopted by the Legislature here in 1884 (47 Vic., c. 19), the subsection dealing with the right of a married woman to sue alone was altered in the revision of the statutes of Ontario of 1887. The words "either in contract or in tort, or otherwise" were dropped, so that what there appeared as subs. 2 of s. 3 read as follows:

"(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

In *Lellis v. Lambert* (1897), 24 O.A.R. 653, the Court of Appeal considered this subsection of the Ontario statute. Burton C.J.O., at p. 659, said:

"I should have thought that it was not intended by this section to give a general right to a married woman to sue and be sued as if she were a *feme sole* to all intents and purposes, but that the passage, found as it is in the same section which confers upon her new rights in respect to property, was intended

to confer upon her also the power of suing for any injury to that property.”

As to the opinion of other members of the Court, see Osler J.A. at p. 665, Maclellan J.A. at p. 671. It is of particular importance to know the view taken in this case of the limited effect of the statutory provision as to the right of a wife to sue alone, for the reason that the decision in *Lellis v. Lambert* has continued to be taken as the ruling case in Ontario. Undoubtedly, if a married woman could not sue alone as if she were a feme sole except in respect of injuries to her separate property, she could not bring an action such as the present action, in her own name. For practical purposes that meant that she could not bring the action at all.

In 1913, in a re-enactment in revised form of The Married Women's Property Act, s. 3(2) was not given the form it had taken in the revision of 1887. The words that had been omitted from the corresponding provision of the Imperial Act of 1882 were re-inserted, and as revised the provision is found in s. 4(2) of the Act of 1913 (3-4 Geo. V., c. 29). There would appear to be no sound reason for refusing to give the subsection, as so enacted in 1913, the same effect as has always been given to the same provision in the Imperial statute of 1882. A married woman was thereby given the right, generally, to sue in contract and in tort, without joining her husband as a co-plaintiff. The procedural difficulty was, therefore, removed in 1913.

Notwithstanding this important change in the statutory right of a married woman to sue alone, no notice of it was taken in the several cases since decided in this Province in which the cause of action was similar to that sued upon here. These cases are referred to by my brother Laidlaw in his judgment, and in all of them *Lellis v. Lambert* was applied. He has also pointed out the clear distinction between the cause of action set up in *Lellis v. Lambert* and the cause of action sued upon here. I agree with his conclusion that *Lellis v. Lambert* is not binding upon us in this case, on two grounds: (1) that the right of a married woman to sue in her own name without joining her husband was greatly extended in 1913, and (2) that the cause of action is not the same. It follows that the reported cases in this Province referred to by both my learned brothers, in which the cause of action is similar to the cause of action sued

upon here, and in which *Lellis v. Lambert* was regarded as the ruling case, are, likewise, not authorities that we are bound to follow. *Lellis v. Lambert*, in truth, does not decide anything relevant to the case before us.

As has been stated already, the provision of The Married Women's Property Act that gave a married woman the right to sue in her own name without joining her husband as a co-plaintiff did not give her any new cause of action. It is necessary to look elsewhere to discover whether a wife has a legal right to the *consortium* of her husband, a violation of which, committed knowingly, gives her a cause of action. Not much is to be looked for in old cases on the common law, for the simple reason that a married woman's incapacity to sue without joining her husband as a co-plaintiff stood in the way of such an action being maintained. *Lynch v. Knight et ux.*, *supra*, is the case of earlier date than The Married Women's Property Act of 1882 generally referred to in discussions of the common law right of a wife to the *consortium* of her husband, but in that case (which was an action for damages for defamation in which the question of the legal right of a married woman to the *consortium* of her husband was only indirectly involved) Lord Campbell and Lord Wensleydale expressed opposite opinions upon that question. The legal right of a wife to *consortium* remained an open question.

In 1861, when this question was under consideration in *Lynch v. Knight et ux.*, it was not a compelling argument to say that, as the legal right of a husband to *consortium* was conceded him, a similar right must be conceded a wife. At that time a wife could be divorced on proof of her adultery. She could not, however, obtain a divorce on proof of her husband's adultery without more. She was required to prove against him, in addition to adultery, bigamy, cruelty or desertion: The Matrimonial Causes Act, 1857, 20-21 Vict., c. 85, s. 27. If the wife claimed a divorce on the ground of adultery, coupled with bigamy, on the part of her husband, it was not enough for her to prove adultery with one woman and bigamy with another; the adultery and bigamy must both be with the same woman: *Horne v. Horne* (1858), 2 Sw. & Tr. 48, 164 E.R. 909. This is but one illustration of the double standard that prevailed in those days, and for many years afterward.

In England the modern development of the legal rights of a wife arising from her marital status has been considered to include the right to *consortium*. It has been held there that it should be deemed a mutual right of husband and wife, a violation of which will support an action for damages by the one who is wronged. I refer to the several cases cited by my learned brothers, and to what is said by text-writers of authority, also cited, but I forbear quoting from any of them.

It is of assistance, in the consideration of a question where social relations are of fundamental importance, to see what the law is in the United States. In the American Law Institute's Restatement of the Law of Torts, 1938, the matter now under consideration is dealt with in s. 690, and the rule is stated as follows:

"One who alienates the affections of a husband or induces a husband to separate from his wife or not to return to her or who has sexual intercourse with him is liable to the wife for harm thereby caused to any of her legally protected marital interests under the same conditions as would permit the husband to recover for similar wrongs as stated in secs. 683-689."

In the notes upon the rule so stated the following appears under the heading "Damages":

"In an action by a married woman under the rule stated in this Section, she may recover for the loss of her husband's affections and other incidents of the marriage relation which receive legal protection on behalf of the husband, as, for example, the exclusive right to cohabitation with him and the right to his society and companionship."

The question is also discussed in Prosser on Torts, 1941, at p. 928, where the learned author, after stating the inferior position formerly occupied by a married woman, due, at least in part, to her inability to sue without joining her husband as a co-plaintiff, says: "The altered position of women in the modern world has swept all this into history, and except in one or two states the wife is now given the same rights and remedies as the husband, either by definite statutes or by a more liberal interpretation of the Married Women's Acts in recognition of social changes."

The more recent decisions in England, and the general adoption of the principle they state by authors of standing who have written upon the subject, afford substantial authority in sup-

port of the cause of action set up in the statement of claim in this action. Even if there were no such judicial opinion supporting such a claim by a wife as is made here, in my opinion we would be warranted by the social changes that have in more modern times tended towards equality of the sexes before the courts in deciding that the statement of claim in this action states a good cause of action in law.

In *Wason v. Walter* (1868), L.R. 4 Q.B. 73 at 93, Cockburn C.J. said:

"Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied."

In a recent case in the House of Lords this principle was recognized. There was a question as to what constituted provocation such as would serve to reduce the killing of his wife by a husband from murder to manslaughter, and Viscount Simon said: ". . . the application of common law principles in matters such as this must to some extent be controlled by the evolution of society." *Holmes v. Director of Public Prosecutions*, [1946] 2 All E.R. 124, 62 T.L.R. 466 at 468. I refer also to Salmond on Jurisprudence, chapter 6, entitled "Sources of Law".

It is unnecessary to require evidence to establish the many important changes in social conditions, and particularly in the improved status of women, that have occurred in the past thirty or forty years. These are matters of common knowledge. The suffrage has been granted to women. We have women occupying seats in the Senate and in the House of Commons. We have women practising law and medicine. They have, especially in the late war, invaded almost every industry and filled the places of men in war service, and in great numbers they even enlisted, as non-combatants, in the military and naval services. In the face of the social changes that have resulted from these and other causes, it is impossible to hold that a married woman is still in a status of inequality with her husband in so far as the right to *consortium* is concerned. The proper conclusion is that in this Province, as in England and generally in the United States

of America, the legal rights of husband and wife in relation to *consortium* are mutual, and a violation of that right will support an action for damages.

It should be made clear that on this appeal we are not discussing questions of the evidence necessary to support the action. We are dealing only with the question whether the plaintiff has, in her statement of claim, set up a good cause of action. There may well be difficult questions as to the evidence that will support such an action, depending upon the circumstances of the particular case. All such questions must stand until a later stage of the action, and even to comment upon them at this stage would be unwise.

I would allow the appeal and dismiss the defendant's motion, with costs of the motion and of the appeal to the plaintiff in any event of the cause.

LIDLAW J.A.:—The appellant brought an action to recover damages from the respondent, and I quote in part from the statement of claim as follows:

"1. The Plaintiff is the wife of Solly Applebaum, . . . and the Defendant is a divorced woman

"2. The Plaintiff married the said Solly Applebaum on the 23rd day of October, 1936, and there are two infant children of the said marriage

"3. The Plaintiff alleges that the Defendant, with full knowledge that the Plaintiff is the lawful wife of the said Solly Applebaum, during the years 1943 and 1944, wrongfully enticed and procured the said Solly Applebaum, unlawfully and without the consent and against the will of the Plaintiff, to cease from cohabiting and consorting with the Plaintiff whereby the Plaintiff lost the society and the services of the said Solly Applebaum."

The statement of defence is in part as follows:

"3. The Defendant denies that she did at any time, more particularly during the years 1943 and 1944 as alleged, wrongfully or otherwise entice and procure the said Solly Applebaum as alleged, to cease from cohabiting and consorting with the Plaintiff, and denies that she in any way is responsible for the loss of society and services referred to in the said paragraph No. 3.

"4. The Defendant further denies that the Plaintiff suffered any damages for which the Defendant is legally responsible and submits that the action should be dismissed with costs.

"5. The facts alleged in the Statement of Claim do not disclose a cause of action in law."

The respondent moved the Court "for an order that the statement of claim be struck out and that the action be dismissed or forever stayed on the following amongst other grounds:

"(1) The statement of claim discloses no reasonable cause of action;

"(2) The action is frivolous or vexatious; or, in the alternative, for leave to set down for hearing before the trial the point of law raised by paragraph 5 of the statement of defence".

Upon motion before the Honourable Mr. Justice Schroeder the Court ordered, under date 28th March 1946, that the statement of claim be struck out and that the action be dismissed with costs to be paid by the plaintiff to the defendant forthwith after taxation. The plaintiff appeals to this Court from the order made by the Honourable Mr. Justice Schroeder upon the ground that the order is contrary to law because

"(a) an action does lie by a married woman against another woman for enticing away her husband;

"(b) the Plaintiff's Statement of Claim does disclose a good cause of action."

The question now arises: Can a married woman maintain an action for damages against another woman who has enticed and procured her husband against her will to cease from cohabiting and consorting with her? It is acknowledged that such an action may be brought by a married man against another man who entices away his spouse. It is conceded that a man who procures a married woman to cease from consorting with her husband commits a tort for which a remedy is available in law. The husband possesses in law a right to recover damages from his rival, and is in a position to enforce such right. But it is said by counsel for the respondent that the wife had no such right at common law and cannot now maintain such an action. To give full effect to that contention means that, no matter how inexcusable, wrongful or wicked the conduct of a woman may be in the enticement of a married man away from his wife and the appropriation to herself of all those things to which the wife is entitled by custom, by morals and by mutual understanding, she cannot be called to account nor held liable to the unfortu-

nate woman whom she supplants. She may (if the law be as counsel argues), by wiles, by guile, deceit and fraud, wilfully interfere with the relationship between a man and his wife and cause him to separate from her and destroy the marriage union, without committing any fault in law. Can it be that the emancipation of women, entitled to the liberties, benefits and rights afforded to them by the laws of this Province, is so incomplete as to deny the existence in their favour of a remedy for the violation of their most precious rights? Is the march forward in social development and conditions halted in the dark days of the past, shrouded by fictions and fabrication of the time, or has the law kept step with changed conditions and circumstances? I am concerned solely with the law as it is, and not as I think it should be, and I therefore inquire into the principles upon which the answer to the question before the Court depends.

At common law an action lay for enticing away a servant, and also for receiving or continuing to employ the servant of another after notice, without enticing him away: *Blake v. Lanyon* (1795), 6 Term Rep. 221, 101 E.R. 521; *Fred. Wilkins and Brothers, Limited v. Weaver*, [1915] 2 Ch. 322. A like action could be maintained by a husband "against such as persuade and entice the wife to live separate from him without a sufficient cause": Blackstone's Commentaries, Book 3, p. 139; *Winsmore v. Greenbank* (1745), Willes 577, 125 E.R. 1330. It is helpful to study the opinion of Lord Chief Justice Willes and consider carefully the principles upon which the judgment in that case depends. It was held that: "In an action on the case for inducing the plaintiff's wife to continue absent it is sufficient to state that 'the defendant unlawfully and unjustly persuaded procured and enticed the wife to continue absent, &c. by means of which persuasion &c. she did continue absent &c.; whereby the plaintiff lost the comfort and society of his wife;' without setting forth the means &c. used by the defendant".

The first count of the declaration stated, *inter alia*, that the plaintiff, during the period his wife lived apart from him, " . . . lost the comfort and society of his said wife and her aid and assistance in his domestic affairs . . . and was put to great charges and expences in endeavouring to find out and gain access to his said wife in order to persuade and procure her to be reconciled to him".

The second count showed that the defendant “ . . . maliciously and wickedly intending to injure the plaintiff, and to deprive him of the aid assistance and comfort of his wife, and to raise foment and continue discords and quarrels between the plaintiff and his wife, and to alienate the affections of the wife from the plaintiff, . . . unlawfully and unjustly persuaded procured and enticed the said wife to depart and absent herself from the plaintiff”.

I need not refer in particular to the third and fourth counts of the declaration. The defendant made a number of objections to the declaration. The first general objection was that there was no precedent for such an action, and that, therefore, it would not lie. It was stated, however, by the Lord Chief Justice that “the law will never suffer an injury and a damage without a remedy”.

The second objection was that there must be *damnum cum injuria*. The Lord Chief Justice stated: “I admit likewise the consequence, that the fact laid before per quod consortium amisit is as much the gist of the action as the other; . . . By injuria is meant a *tortious* act; it need not be *wilful and malicious*; for though it be accidental, if it be tortious, an action will lie.” (The italics are mine.) On p. 584, he stated: “ . . . every moment that a wife continues absent from her husband without his consent, it is a new tort, and every one who persuades her to do so does a new injury and cannot but know it to be so.”

The gist of the decision is, as I see it, that the act of enticing or persuading a wife to live separate from her husband without his consent is a tort, and, if it results in damages to the husband, an action for them will lie.

Winsmore v. Greenbank, *supra*, was approved by Mathew J. in advising the House of Lords in *Allen v. Flood et al.*, [1898] A.C. 1 at 27. In that case Lord Watson, at p. 92, said:

“Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent.”

At p. 107, Lord Watson continues: “He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured.”

Lord Herschell, at pp. 122-3, treated *Winsmore v. Greenbank* as correct in law.

In my opinion, the true test to ascertain whether *injuria* exists is: Was there an invasion of the civil rights of the plaintiff? It is well settled that it is a violation of a legal right to interfere with contractual or other legal relations without sufficient cause or justification for such interference: *Lumley v. Gye* (1853), 2 E. & B. 216, 118 E.R. 749; *Quinn v. Leathem*, [1901] A.C. 495 at 510. If then a man who invades the rights of a husband to the *consortium* of his wife is a wrongdoer, can it be successfully contended that a woman who entices, persuades or procures a husband to separate from his wife does not violate a legal right of the wife? Such a contention must surely fail. It could only be supported on the basis of a real and substantial distinction in the nature of the rights to *consortium* possessed in law by the husband from those of the wife. Such distinction does not, in my opinion, exist. It may be that in the earliest Teutonic laws there are traces of "marriage by capture", but the usual and lawful marriage was a "sale-marriage". But the sale was not of the person of the bride. It was not a purchase of a chattel by a man. It was a sale of the *mund*, the protectorship, over the woman: Pollock and Maitland, *History of English Law*, 1911, vol. II, p. 364. The position of married women at common law is described by Blackstone, and as quoted in Stephen's *Commentaries on the Laws of England*, 19th ed. 1928 (G. C. Cheshire), vol. 1, at p. 273, as this:

"By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *feme covert*, *foemina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage."

Referring again to Pollock and Maitland, *op. cit.*, at pp. 405-6 the learned authors say:

"If we look for any one thought which governs the whole of this province of law, we shall hardly find it. In particular we must be on our guard against the common belief that the ruling principle is that which sees an 'unity of person' between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph, and may now and again lead us out of or into a difficulty; but a consistently operative principle it can not be. We do not treat the wife as a thing or as somewhat that is neither thing nor person; we treat her as a person. Thus Bracton tells us that if either the husband without the wife, or the wife without the husband, brings an action for the wife's land, the defendant can take exception to this 'for they are *quasi* one person, for they are one flesh and one blood.' But this impracticable proposition is followed by a real working principle;—'for the thing is the wife's own and the husband is guardian as being the head of the wife.' The husband is the wife's guardian:—that we believe to be the fundamental principle"

In *Reg. v. Jackson*, [1891] 1 Q.B. 671 at 679, Lord Halsbury L.C. says: "With regard to the proposition that the mere relation of husband and wife gives the husband complete dominion over the wife's person, apart from any circumstances of misconduct or any acts amounting to a proximate approach to misconduct on her part, which would give the husband a right to restrain her, none of the authorities cited appear to me to establish that proposition."

While it cannot be doubted that at common law a man acquired by marriage a right of guardianship and protectorship over his wife, yet the obligations voluntarily assumed by each of them to the other are alike in nature. On the part of each party to the marriage there was a solemn vow and binding undertaking to love and cherish the other in sickness and in health, for better for worse. It was the civil right of each of them to enjoy all the benefits of the union. Indeed a married woman herself could maintain proceedings in the ecclesiastical court for restitution of conjugal rights and for a decree of judicial separation. Her rights in law were not all extinguished by marriage, but she had no capacity to enforce them as against strangers. She might be the object of slander, assault or other wrong, but an action for loss or damage sustained by reason thereof could not be maintained in her name alone. The husband

was joined as a party to the proceedings "for conformity", and it has been said that the joinder was "by reason of the universal rule that the wife during coverture cannot be either a sole plaintiff or a sole defendant": *Capel v. Powell et al.* (1864), 17 C.B. N.S. 743 at 748, 144 E.R. 298. The application of that rule did not in any way deny the existence of the civil rights of the woman, even though the remedy did not exist. The impediment to the enforcement of such rights as she possessed was by reason of her incapacity to act alone in proceedings in the courts.

It has been argued in numerous cases that the *consortium* to which a married woman is entitled is of a different character and of a lesser quality than that to which a married man is entitled from his wife, and is not such as to support a claim for damage in the event of its loss: see, for instance, *Lynch v. Knight et ux.* (1861), 9 H.L. Cas. 577, 11 E.R. 854. I do not discuss that case in detail. I point out, however, that it was held that the damages claimed were too remote and not the natural consequence of the *injuria*. There were conflicting opinions, but dicta only, as to the right of a married woman to maintain an action based on enticement or procurement of her husband to cease cohabitation with her. In the light, however, of subsequent discussion and judicial opinions, it cannot properly be said that the dicta in *Lynch v. Knight* support the argument that the right of *consortium* of a married woman is different in kind or quality from that possessed in law by her husband, or that an action by a wife for the loss of such *consortium* does not lie. I think it must be now held that there is no inequality between the sexes, and that conjugal *consortium* is mutual in kind and quality. It is in this sense that *consortium* is referred to by Lord Halsbury in *Reg. v. Jackson, supra*, at p. 680. Again, it is well settled, I think, that the element of *consortium* upon which an action of the kind under consideration is based is not loss of services on the part of the husband but his loss of company and society: see *Norris v. Seed* (1849), 3 Ex. 782 at 791, 154 E.R. 1061 at 1065; see also *Davies et ux. v. Solomon* (1871), L.R. 7 Q.B. 112; *Campbell et ux. v. Campbell* (1875), 25 U.C.C.P. 368 at 373-4.

Thus I conclude that by the common law of England it is a tort on the part of anyone to interfere without lawful excuse or justification in the relationship of a wife and her husband by enticement, persuasion or procurement of the husband to

separate or remain away from his wife without her consent; that the loss by the wife of cohabitation with her husband is sufficient loss of *consortium* to constitute *damnum* to her; that an action for the loss sustained by her in consequence of such tortious act could not be maintained by her only because of her incapacity at law to do so. That incapacity has been removed by statute. In England, The Married Women's Property Act of 1882 provided by s. 1(2) that "A married woman shall be capable of entering into and rendering herself liable . . . on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole"

Viscount Cave in *Edwards et al. v. Porter*, [1925] A.C. 1 at 10, says: ". . . it is evident that this enactment removes the sole ground on which it had been held necessary and proper in an action against a married woman for a wrong committed by her during the coverture to join her husband as a co-defendant. He was joined as a defendant only by reason of the 'universal rule' that a wife could not be sued alone; but this 'universal rule' has now been abrogated, for it has been enacted that she can be sued alone 'as if she were a feme sole.' "

Lord Sumner, at p. 37, states: "The sub-section is in the main an enabling provision in favour of the wife. She is made capable of suing and of being sued as if she were a feme sole, It is a procedural provision, . . . the married woman gains her liberty in litigation on the terms of the same liberty being given to those who wish to sue her." He continues, at p. 41, as follows: "The sub-section deals in one and the same sentence with actions of tort and actions of contract, with actions brought by and actions brought against the feme covert, and in respect of all of them it purports to remit her to the position of a feme sole."

It has been decided in England that an action will lie by a married woman against another woman for enticing away the plaintiff's husband: *Gray v. Gee* (1923), 39 T.L.R. 429.

In 1932, Scrutton L.J., stating his opinion in *Place v. Searle*, [1932] 2 K.B. 497 at 512, says: "It seems to be clear that at the present day a husband has a right to the consortium of his wife, and the wife to the consortium of her husband, and that each has a cause of action against a third party who, without justification, destroys that consortium."

Slessor L.J., at p. 520, says: "If the matter is considered as one of principle, this kind of action is founded upon a violation of a legal right, and so we have to inquire whether the defendant has done something which amounts to such a violation."

The principle as stated in *Allen v. Flood*, *supra*, was applied.

The case of *Gray v. Gee*, *supra*, was before the Court of Appeal on the argument in *Place v. Searle* and is expressly referred to, at p. 521, by Slessor L.J.

In *Newton v. Hardy et al.* (1933), 149 L.T. 165, 49 T.L.R. 522, Swift J. held: "A married woman has a legal right to the consortium of her husband and can recover damages from anyone who violates that right. In order to recover such damages, she must prove that her husband has been enticed, procured, or persuaded by the defendant to cease from cohabiting and consorting with her."

In *Elliott v. Albert*, [1934] 1 K.B. 650, Scrutton L.J., at p. 659, says: "A Mrs. Elliott brings an action against a Mrs. Albert in the King's Bench Division in which she alleges a well-established cause of action, namely, that the defendant had deprived her of the consortium of her husband; and claimed damages for wrongfully enticing away the plaintiff's husband and thereby depriving her of the consortium to which she is entitled."

In The Law Reform (Miscellaneous Provisions) Act, 1934 (Imp.), c. 41, s. 1(1), the cause of action is referred to as "inducing one spouse to leave or remain apart from the other."

Many writers of text-books hold the view that such an action is maintainable: see Eversley on Domestic Relations, 5th ed. 1937, p. 155; Salmond on Torts, 10th ed. 1945, p. 369; Underhill on Torts, 15th ed. 1946, p. 288.

The High Court of Australia has held in *Wright v. Cedzich* (1930), 43 C.L.R. 493, that "inducing a husband against the will of his wife to depart and remain absent from the home, whereby the wife loses the society, comfort, protection and support of her husband, affords her no cause of action". With the utmost respect for the learned jurists of that opinion, I nevertheless prefer the dissenting judgment of Isaacs J., whose views and reasoning I adopt with great satisfaction.

I turn now to the law of this Province. The Property and Civil Rights Act, R.S.O. 1937, c. 145, s. 1(1) provides:

"In all matters of controversy, relative to property and civil rights, resort shall be had to the laws of England as they stood

on the 15th day of October, 1792, as the rule for the decision of the same, . . . except so far as such laws and rules have been since repealed, altered, varied, modified or affected . . . by any Act of the late Province of Upper Canada, or of the Province of Canada, or of the Province of Ontario, still having the force of law in Ontario."

I shall trace the relevant changes made by legislation to the laws of England as they stood on the 15th October 1792. I merely refer to the legislation prior to 1897 as follows: 43 Geo. III (U.C.), c. 5; 1 Will. IV (U.C.), c. 2; 22 Vict. (Can.), c. 34 (C.S.U.C. 1859, c. 73); 35 Vict., c. 16; 36 Vict., c. 18; R.S.O. 1877, c. 125; 47 Vict., c. 19; R.S.O. 1887, c. 132; 60 Vict. c. 22.

The Married Women's Property Act, R.S.O. 1897, c. 163, provides by s. 3(2) that "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued in all respects as if she were a *feme sole*"

In 1913 The Married Women's Property Act, as contained in c. 163 of R.S.O. 1897, was repealed by c. 29 of the Statutes of Ontario. By s. 4(2) it was provided that "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*". The same language is now found in The Married Women's Property Act, R.S.O. 1937, c. 209, s. 3(1). It is to be particularly noted that by c. 29 of the statutes of 1913, *supra*, there were added to the language of the prior legislation the following words: "either in contract or in tort or otherwise".

Counsel on behalf of the respondent relies in support of his argument on the authority of the following cases: *Lellis v. Lambert* (1897), 24 O.A.R. 653; *Lawry v. Tuckett-Lawry* (1901), 2 O.L.R. 162; *Weston v. Perry* (1909), 1 O.W.N. 155, 14 O.W.R. 956; *Seguin v. Laferriere* (1924), 25 O.W.N. 607; *Talmage v. Talmage*, 62 O.L.R. 209, [1928] 3 D.L.R. 15; *Barks v. Done*, [1933] O.R. 784, [1933] 4 D.L.R. 540, affirmed [1933] O.W.N. 822, [1934] 1 D.L.R. 789. The decisions subsequent to *Lellis v. Lambert*, *supra*, decided in 1897, follow and depend upon the authority of that case. It becomes necessary, therefore, to

examine it and compare it with some care to the one presently before the Court. The statement of claim, in substance, in *Lellis v. Lambert*, as set forth in the judgment of Osler J.A. at p. 661, is as follows:

“Par. 3. That in the autumn of 1893, and during the year 1894, the defendant wrongly alienated the affections of the plaintiff’s husband from her. 4. That during that time the defendant was very intimate with him, constantly paying him undue attention, harbouring him at her house, driving with him, promenading and attending parties with him, lending him money to pay a fine and to stock his shop. 5. That she used all her influence to prevent him from supporting the plaintiff. 6. *Per quod* the plaintiff was deprived of the society, services and support of her husband, and suffered annoyance and disgrace, and mental and bodily pain, and loss of reputation and esteem of friends, etc.” I omit any reference to other allegations in the statement of claim relating solely to a claim for damages for criminal conversation.

Osler J.A., at p. 662, made it plain that the question to be determined in the case before the Court was, “whether on the pleadings or evidence any cause of action is shewn.” He stated plainly, at p. 663: “The first part of the statement of claim, pars. 1 to 6 inclusive if setting forth a claim under similar circumstances by a husband against another man in respect of his wife, would shew no cause of action.” He did not hesitate to say, at p. 664, that a husband might maintain an action against one who “persuaded, procured and enticed his wife to continue absent and apart from him, and to secrete, hide and conceal herself from him, whereby during the time she continued absent he lost her comfort and society and her aid and assistance in his domestic affairs”, and also for “receiving her and unlawfully harbouring, concealing and secreting her from him, and refusing to deliver her to him.” He then continued: “The statement of claim here sets forth no cause of action of that kind, and adultery not being charged in the paragraphs I have referred to, they would appear to disclose no cause of action, there being nothing to cause the loss of the husband’s *consortium*, assuming that the loss thereof might be the foundation of an action by the wife. The loss of a wife’s affections not brought about by some act on the defendant’s part which necessarily caused or involved the loss of her *consortium*, never gave a cause of action to the husband.”

He proceeds: "... there being no adultery and no 'procuring and enticing,' or 'harbouring and secreting' of the wife, no action lay at the suit of the husband against the man. A wife can be in no better position to maintain an action against a woman guilty of similar conduct towards her husband."

Burton C.J.O. makes a careful examination of the American cases and gives effect to the language of the statute as contained in the statute law as it stood at the time of his decision. He states: "Full effect is given to the words of the Act by confining her right to sue and her liability to be sued to her separate property, and her contracts in respect of that property". He relied, in part, on the comments of Mr. Eversley in *The Law of Domestic Relations*, 2nd ed., p. 360. MacLennan J.A. was of opinion that "no such action as the present existed, or could be brought, at common law."

Moss J.A. concurred in the judgment of the Court.

The cause of action as set forth in the statement of claim in *Lellis v. Lambert* is not founded upon any alleged violation by the defendant of the plaintiff's contractual or other legal rights. It is not based upon the application of the well-established principle stated in *Winsmore v. Greenbank*, *supra*; *Lumley v. Gye*, *supra*; *Allen v. Flood*, *supra*; *Quinn v. Leathem*, *supra*, and many other authoritative decisions. The complaint is not enticement, persuasion or procurement by the defendant, thereby causing the spouse of the plaintiff to live apart and cease cohabitation with the plaintiff. It rests only on the claim that the defendant alienated the affections of the plaintiff's husband from her. Moreover, the evidence as summarized by Osler J.A. does not touch the matter of enticement, persuasion or procurement. "... the question under discussion in that case was the right of a wife to maintain an action for the alienation of the husband's affections, adultery being charged": *per* Middleton J. in *Bannister v. Thompson* (1913), 29 O.L.R. 562 at 565, 15 D.L.R. 733, affirmed with a variation (1914) 32 O.L.R. 34, 20 D.L.R. 512. I cannot accept the case as a decision that a married woman has no cause of action or remedy against a third party who without justification destroys the *consortium* to which she is entitled by law from her husband. On the contrary, the decision must be limited to the question stated by Osler J.A. at p. 662, namely, whether on the pleadings or evidence any cause of action was shown. The later

decisions in our courts depending for their authority on *Lellis v. Lambert* can be placed no higher and given no greater effect in law.

It is to be noted also that the learned jurists had under consideration, and gave effect to, only the statute law as it then existed. Since that time material changes have been made. It cannot now be said that the right of a married woman to sue, and her liability to be sued, is confined to her separate property and contracts in respect to that property. She may now sue or be sued "either in contract or in tort or otherwise". It would indeed be a strange and absurd inconsistency in the law if it were otherwise. She can maintain an action against a person who by negligence causes her the slightest ache or pain. She can sue a wrongdoer who violates a contractual or legal right resulting in the smallest loss. She possesses a remedy whereby she can recover any loss or damage sustained by reason of an invasion of her property or personal rights. How then can it be held that she has no remedy and cannot maintain an action against a person who invades and wrongfully interferes with her right to the *consortium* of her husband?

Again, I may add that in any action for divorce, which a wife is entitled to maintain by express rights conferred upon her, she is required by the Rules of Practice to join therein the name of a known adulteress. She might in a proper case be given an award of costs against that person. If, however, the wrongdoing of another woman by her enticement causes her husband to forsake and desert her but falls short of the wrongful act of adultery, no remedy would be available and no claim for that irreparable loss would be possible, if the respondent's contention were right. Surely such a state of injustice does not exist in this Province.

It was strongly urged that this Court is bound by the decision in *Lellis v. Lambert*. For the reasons pointed out by me, I think that the question now to be decided was not considered or decided in that case. In any event, the circumstances are such that the decision cannot be considered as a binding authority. Much judicial light has been given to the question by decisions in England, to which I have referred, and the statute law in its present form has been considered, discussed and given full effect in those decisions. The changes made in the statute law in this

Province since the decision in *Lellis v. Lambert* do not appear to have received judicial consideration in later cases. Under the circumstances I think we are not bound to follow that decision: *Stuart v. Bank of Montreal et al.* (1909), 41 S.C.R. 516 at 535; *In re Shoemith*, [1938] 2 K.B. 637 at 644, 645, and 652-3, referred to by Kellock J.A. in *Rex v. Eakins*, [1943] O.R. 199 at 201, [1943] 2 D.L.R. 543, 79 C.C.C. 256. See also *Young v. Bristol Aeroplane Company, Limited*, [1944] K.B. 718 at 729.

It is to be observed too, that in *Bannister v. Thompson*, *supra*, Middleton J. declined to accept the statement of law made by Osler J.A. in *Lellis v. Lambert*, *supra*. In that case he referred to the two counts, first, enticing away, and secondly, alienating the affections of the plaintiff's wife by the defendant, and stated: "The considerations applicable to each of the counts differ." At p. 564, he said: "It is not the fact that the woman is staying with her paramour that constitutes the wrong; it is depriving the plaintiff of the wife's *consortium* . . ." He was of opinion "that the law recognises the right of the husband to recover damages against a defendant for any misconduct which deprives the plaintiff of the love services and society of his wife—to use the words of this pleading—Commonly called *consortium*." Likewise, I think that such a right of the wife to recover damages against another woman also exists and may be enforced by the laws of this Province. I refer with approval to *Quick v. Church* (1893), 23 O.R. 262, and to *Sheppard v. Sheppard* (1922), 51 O.L.R. 520, 69 D.L.R. 570. In particular, however, and in conclusion I desire to adopt the language of Isaacs J. in his admirable judgment in *Wright v. Cedzich*, *supra*, at p. 518, supporting the right of a married woman to maintain an action for damages founded on the wrongful enticement of a defendant. He says:

" . . . I am at a loss to understand why she should be unable to obtain in the King's Courts on ordinary principles, and in the ordinary way, redress for deprivation of rights which, if she is a normal wife and mother, are the most precious she possesses . . . it seems clear to me that the opinions above referred to in judicial decisions and text-books which are in favour of the wife's right of action preponderate not merely in number but also in adherence to principle and to the line of legal development. The respondent asks us to take a retrograde step into the dark ages of the law."

I would, accordingly, allow the appeal and direct that the motion in the Court below be dismissed with costs to the appellant in both courts in any event of the cause.

ROACH J.A. (*dissenting*):—The plaintiff is a married woman and brought this action to recover damages from the defendant on the allegation that the defendant, a divorcee, “wrongfully enticed and procured [the plaintiff’s husband], unlawfully and without the consent and against the will of the Plaintiff, to cease from cohabiting and consorting with the Plaintiff; whereby the Plaintiff lost the society and services of [her husband]”.

The defendant in her statement of defence denied the allegation and also pleaded in substance that such an action does not lie in Ontario. She then moved the Court for an order striking out the statement of claim and dismissing the action on the point of law raised in her pleading. The motion was heard by the Honourable Mr. Justice Schroeder, who made the order then sought. From that order the plaintiff now appeals.

It seems very clear to me that if the facts as alleged by the plaintiff are true, she has suffered a very real injury as the result of the defendant’s wrongful conduct. The sole point in this appeal is as to the right of the plaintiff to maintain an action for damages as a result of that injury.

That a wife is not the mere servant of her husband, and that she is entitled to her husband’s society and the protection of his name and home, in cohabitation, are propositions which no one in this day and age would have the temerity to challenge. The home is the unit of our society, and by the home is not meant the mere lumber, bricks or stones which provide the shelter; it is the family, the parents and their children, living in the normal relationship which they bear to one another. In that unit the husband is usually the bread-winner, but the wife is entitled to more than merely his financial support. She is entitled to his moral support, his society, his comfort, his co-operation in the multitude of problems which arise in the operation and management of the home and the upbringing of their offspring. I should have thought that if some other woman by a wrongful act deprives the wife in whole or in part of any of those things, she commits more than a moral wrong; that she does a legal injury to the wife just as another man would do a legal injury

to a husband if by a wrongful act he deprived the husband of the comfort and society of his wife.

The right of a wife to sue and recover damages for the violation of that right is recognized in England, and has been before the Courts of this Province in cases to which I shall later refer.

I deal first with the English cases. In *Lynch v. Knight et ux.* (1861), 9 H.L. Cas. 577, 11 E.R. 854, the plaintiff sued to recover damages for the loss of the *consortium* of her husband as the alleged result of slanderous statements published by the defendant concerning her. The action failed because, as it was held, the loss or special damage relied upon was not the natural and probable consequence of the speaking of the slanderous words. Dicta of the Lord Chancellor (Lord Campbell) and of Lord Wensleydale in that case indicate their opposing views on the question as to the right of a wife to maintain an action for damages for loss of *consortium*. Some of those dicta have been referred to in subsequent reported decisions. They may bear repetition.

Lord Campbell, at p. 589, said: "Although this is a case of the first impression, if it can be shown that there is presented to us a concurrence of *loss and injury* from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone. If the special damage alleged to arise from the speaking of slanderous words, not actionable in themselves, results in pecuniary loss, it is a loss only to the husband; and although it may be the loss of the personal earnings of the wife living separate from her husband, she cannot join in the action. But the loss of conjugal society is not a pecuniary loss, and I think it may be a loss which the law may recognise, to the wife as well as to the husband. The wife is not the servant of the husband, and the action for criminal conversation by the husband does not, like the action by a father for seduction of a daughter, rest on any such fiction as a loss of the services of the wife. The better opinion is that a wife could not maintain or join in an action for criminal conversation against the paramour of her husband who had seduced him. But I conceive that this rests on the consideration that, by the adultery of the husband, the wife does not necessarily lose the *consortium* of her husband; for she may, and, under certain circumstances, she ought to

condone and still enjoy his society; whereas condonation of conjugal infidelity is not permitted to the husband, and, by reason of the injury of the seducer, the *consortium* with the wife is necessarily for ever lost to the husband”.

As opposed to the views expressed by the Lord Chancellor in the foregoing dictum is the view expressed by Lord Wensleydale at pp. 598-9. He said:

“I agree with Baron Fitzgerald, that the benefit which the husband has in the *consortium* of the wife, is of a different character from that which the wife has in the *consortium* of the husband. The relation of the husband to the wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of his children, resembles the service of a hired domestic, tutor or governess; is of material value, capable of being estimated in money; and the loss of it may form the proper subject of an action the amount of compensation varying with the position in society of the parties. . . . It is to the protection of such material interests that the law chiefly attends.

“The loss of such service of the wife, the husband, who alone has all the property of the married parties, may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband’s society and affectionate attention, which the law cannot estimate or remedy. She does not lose her maintenance, which he is bound still to supply; and it cannot be presumed that the wrongful act complained of puts an end to the means of that support without an averment to that effect.”

The point came squarely before the Court in 1923 in the case of *Gray v. Gee*, 39 T.L.R. 429. The case was tried before Mr. Justice Darling and a special jury. The plaintiff’s claim was for damages for the alleged enticing away of her husband, thereby depriving her of his society and *consortium*. The point of law was raised at the trial that such an action was not maintainable. Reference was made by counsel in the course of the argument, and by the learned judge in the course of his judgment, to the opposing views expressed by the Lord Chancellor and Lord Wensleydale in *Lynch v. Knight*, *supra*. Mr. Justice Darling came to the conclusion that this action was maintainable under the law of England, and his views as stated by the reporter were as follows:

"If a man was allowed to bring such an action, why should not a woman? He could see no reason. A woman might not lose quite as much as her husband, but if another woman enticed the husband away she lost far more than necessities and far more than money could replace. . . . He thought it was entirely consistent with the principles of our common law, and he thought the reason why such an action had never been brought before was that there had been difficulties of procedure. These had now been swept away by the Married Women's Property Act, 1882. He was of opinion that the rights of the two parties were the same. The difficulty had been, not that there was not the right, but that the remedy had not been devised. The law had devised that remedy by the Act which gave a married woman the right to sue in her own name for her own benefit."

Darling J. having so decided, the action proceeded. Apparently this case went no further.

The point again came before the Court in 1923 in *Newton v. Hardy et al.*, 149 L.T. 165, 49 T.L.R. 522, and that action was tried by Mr. Justice Swift, without a jury. That learned judge said:

" . . . my own impression is that this action will lie, and that if a wife can prove that her husband has been enticed, procured, persuaded to leave the *consortium* which is common between husband and wife, she is entitled to recover damages against the enticer."

He then referred to the judgment of Scrutton L.J. in *Place v. Searle*, [1932] 2 K.B. 497, as follows:

" 'It seems to be clear that at the present day a husband has a right to the consortium of his wife, and the wife to the consortium of her husband, and that each has a cause of action against a third party who, without justification, destroys that consortium.' "

And then continuing with his own view he said: " . . . I cannot for myself think that now, as Lord Campbell said in *Lynch v. Knight* (*supra*), the right to sue for damaging the consortium is limited to the husband. It is a mutual right of husband and wife, and, if anybody breaks into it and violates it, then either of them, in my view, is entitled to sue for damages in respect of that wrong."

This case also apparently went no further.

The English Married Women's Property Act, 1882, is entitled "An Act to Consolidate and Amend the Acts Relating to the Property of Married Women." A section of that Act, s. 1(2), reads as follows:

"A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole".

It will be observed that that section is similar to the present section of the statute in this Province.

In referring to the decisions in our own courts it is well to have in mind the provisions of the Ontario Married Women's Property Act as of the dates of those decisions. Section 3(2) of that Act, in the revision of 1887, c. 132, was as follows:

"A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued in all respects as if she were a feme sole"

While the law in this Province as to the right of a married woman to maintain an action in her own name, without her husband being joined, was as above stated, the first case to come before our Courts was *Quick v. Church* (1893), 23 O.R. 262. It was there held by a Divisional Court, *per* Armour C.J., that a claim by a married woman for loss of *consortium* was a good cause of action at common law, and that any former difficulties as to procedure had been removed by the statute, and that the action was therefore maintainable.

This was followed in 1897 by the case of *Lellis v. Lambert*, 24 O.A.R. 653. By the judgment of the Court of Appeal in that case the decision in *Quick v. Church* was overruled, and it was decided that such an action would not lie, either at common law or under the statute. The judgment in that case deserves close scrutiny. In the first place, as appears from the reasons of Osler J.A. at p. 661, the statement of claim contained first an allegation of alienation, and, secondly, one of criminal conversation, but no allegation of enticement. Dealing with the absence of an allegation of enticement, Osler J.A. said that there was no cause of action disclosed in that part of the pleading which alleged alienation, "there being nothing to cause the loss of the

husband's *consortium*, assuming that the loss thereof might be the foundation of an action by the wife." Then, turning to the claim based on the allegation of criminal conversation, he said:

"The principle of the English law is the complete union of the wife with the husband. That, I think, is still her matrimonial status, except in so far as it may have been affected by the provisions of the Married Woman's Property Act of 1884, 47 Vict. ch. 19(O), R.S.O. ch. 132. Section 2 of our Act of 1884 was a transcript of the corresponding section of the English Act of 1882. In the revision a slight change of expression occurs not affecting the sense. The wife is declared to be capable of suing and being sued 'in all respects', instead of (as in the original Act) 'either in contract or in tort or otherwise.' . . .

"I cannot regard the Act as extending to confer such a right of action upon the wife as is here sought to be enforced. It does not, except in specified cases and in qualified terms, create any new right of action in her."

At p. 668 he said: "I am of opinion, with all deference to the contrary view expressed in the case of *Quick v. Church*, 23 O.R. 262, that there was no legal right in the wife at common law to maintain such an action as the present, repressed or in abeyance by reason of the trammels of a technical procedure, and therefore the provisions of the Married Woman's Property Act cannot aid her in this respect, as they confer upon her no new right of action, and do not alter the status of the married woman or the relation of husband and wife further than is necessary to give effect to her rights of property."

Burton C.J.O. held a similar view, which he expressed at p. 659 as follows:

"I should have thought that it was not intended by this section [of the Married Women's Property Act] to give a general right to a married woman to sue and be sued as if she were a *feme sole* to all intents and purposes, but that the passage, found as it is in the same section which confers upon her new rights in respect to property, was intended to confer upon her also the power of suing for any injury to that property. . . .

"Full effect is given to the words of the Act by confining her right to sue and her liability to be sued to her separate property, and her contracts in respect of that property, and I do not think we are placing a narrow construction upon these words when we thus confine them."

MacLennan J.A. held that there was no such right of action in the wife at common law nor under The Married Women's Property Act, and the fourth member of the Court, Moss J.A., concurred.

The point next came before the Court of Appeal in *Weston v. Perry* (1909), 1 O.W.N. 155, 14 O.W.R. 956, and that Court, composed of Moss (then C.J.O.) and Osler and Meredith JJ.A., simply rested its decision upon the judgment in *Lellis v. Lambert*.

By 1913, 3-4 Geo. V., c. 29, The Married Women's Property Act was repealed and re-enacted, with certain changes. Section 4(2) of that Act now appears as s. 3(1) of R.S.O. 1937, c. 209, and conforms to the wording in the English Act.

The first case subsequent to the amendment was *Talmage v. Talmage*, 62 O.L.R. 209, [1928] 3 D.L.R. 15. That was a decision by a single judge, Middleton J.A., on a motion by the defendant for an order dismissing the action on the ground that the statement of claim disclosed no reasonable cause of action. That learned judge followed the decision in *Lellis v. Lambert*, but no reference is made in the report of his judgment to the change in The Married Women's Property Act.

This was followed by the case of *Barks v. Done*, [1933] O.R. 784, [1933] 4 D.L.R. 540, in which Mr. Justice Hope, on an application by the defendant, struck out the statement of claim as disclosing no cause of action, and dismissed the action, following the decision in *Talmage v. Talmage*. On appeal, [1933] O.W.N. 822, [1934] 1 D.L.R. 789, the Court of Appeal simply dismissed the appeal, without calling on counsel for the respondent. Neither in the judgment of Mr. Justice Hope nor in the Court of Appeal was the change in The Married Women's Property Act apparently considered.

It will now be apparent that in England by the more recent decisions the Courts have held that a married woman had a good cause of action at common law for loss of *consortium* brought about by the enticement or procurement of her husband by another woman, and that any difficulty in the procedure had been swept away by the statute there, while in Ontario the Courts have denied that there was such a cause of action at common law, and have held that our statute, which is now similar to the English Act, has not created such a right. Moreover, the British Parliament by The Law Reform (Miscellaneous Pro-

visions) Act, 1934, 24 and 25 Geo. V., c. 41, has recognized that such a cause of action existed at common law. Section 1(1) thereof is as follows:

"Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this sub-section shall not apply to causes of action for defamation or seduction or *for inducing one spouse to leave or remain apart from the other. . .*" (The italics are mine.)

Were it not for the decisions of our own Courts to the contrary, I would most certainly have held the judicial opinion that such a claim as the plaintiff here puts forward constituted a good cause of action at common law. I respectfully bow to those decisions on that point, as I conceive it my duty to do: see *Stuart v. Bank of Montreal et al.* (1909), 41 S.C.R. 516 at 534. It cannot be said that the judgment in *Lellis v. Lambert* was the result of any inadvertence or slip. The point was squarely before our Court, and I consider the judgment binding upon me.

It therefore follows that if a married woman had no such cause of action at common law, that is decisive of the point here raised, because our statute, even as amended, does not create such a cause of action. It merely gives a right to sue "either in contract or in tort or otherwise". Therefore, before the plaintiff could sue in tort the alleged reprehensible conduct of the defendant would first have to be declared actionable. If it was not such at common law, then the Legislature alone can declare it to be so. I would hope that no time would be lost by the Legislature of this Province in enacting legislation to that effect, and thereby putting the sexes in that respect in identical positions. In that connection words spoken by the late The Right Honourable Lord Tweedsmuir when he was Governor-General of Canada, at a special convocation of the benchers of the Law Society of Upper Canada on the 21st February 1936, are timely. He said:

"Law, I think, should be regarded as an elastic tissue which clothes the growing body. That tissue, that garment, must fit exactly. If it is too tight it will split, and you will have revolution and lawlessness, as we have seen at various times in our history when the law was allowed to become a strait-waistcoat. If it is too loose it will trip us up and impede our movements. Law,

therefore, should not be too far behind or too far ahead of the growth of society, but should coincide as nearly as possible with that growth."

The position of women in this modern age is not comparable to the position they held more than a century ago, and if, as Lord Tweedsmuir said, the law should coincide as nearly as possible with the growth of society, then it is time that the Legislature released a wife from the position of marital inferiority which our Court has previously held characterized her position at common law.

There is no course open to me except to say that the appeal must be dismissed, and with costs.

Appeal allowed with costs, ROACH J.A., dissenting.

Solicitors for the plaintiff, appellant: Nathan Phillips & Phillips, Toronto.

Solicitors for the defendant, respondent: Galt, Hollinrake & Bartrem, Toronto.

[COURT OF APPEAL.]

McCart v. McCart and Adams.

Judgments and Orders—Final and Interlocutory—Appeals with or without Leave—Dismissal of Motion to Vary Award of Maintenance—Appointment of Receiver—The Judicature Act, R.S.O. 1937, c. 100, ss. 16, 24—Rule 493.

An order appointing a receiver by way of equitable execution of a judgment of the Court is interlocutory and not final, and there can therefore be no appeal from such a judgment, under s. 24 of The Judicature Act, without leave obtained under Rule 493. *Hendrickson v. Kallio*, [1932] O.R. 675; *Blakey v. Latham* (1889), 43 Ch. D. 23; *Leonard et al. v. Burrows* (1904), 7 O.L.R. 316, applied.

An order dismissing a motion to vary an award of maintenance granted on the dissolution of a marriage is a final one, and appealable without leave, since the award of maintenance is itself a final judgment. *Swaizie v. Swaizie* (1899), 31 O.R. 324, applied; *Head-Patrick v. Patrick* (1922), 15 Sask. L.R. 304, agreed with; *Aldrich v. Aldrich* (1893), 24 O.R. 124; *Maguire v. Maguire* (1921), 50 O.L.R. 100, explained; other authorities discussed.

MOTIONS by the respondent (plaintiff in the action) to quash appeals from two orders made by Wilson J. in Weekly Court at Toronto.

The respondent recovered judgment in 1936, dissolving her marriage with the appellant, and awarding a fixed amount as maintenance. By one of the orders now appealed from, Wilson J. dismissed an application to vary the amount of

maintenance payable under the 1936 judgment, and by the other he appointed a receiver of debts owing to the defendant, by way of equitable execution of the 1936 judgment.

The motions were heard by HENDERSON, HOPE and HOGG JJ.A.

G. A. Gale, K.C., for the respondent, applicant: Both the orders of Wilson J. are interlocutory and there is therefore no right of appeal without leave obtained under Rule 493.

The order appointing a receiver by way of execution is clearly interlocutory under s. 16(1) of The Judicature Act, R.S.O. 1937, c. 100. An order may be interlocutory even if it is made after final judgment in an action. Any order which merely works out the rights of the parties is interlocutory: *Blakey v. Latham* (1889), 43 Ch. D. 23; *Leonard et al. v. Burrows* (1904), 7 O.L.R. 316.

The distinction between interlocutory and final orders is laid down in *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580. An interlocutory order is one which does not finally determine the real matter in dispute between the parties, or which leaves the merits of the case to be determined.

Maguire v. Maguire (1921), 50 O.L.R. 100, 64 D.L.R. 564, is authority for holding that the order dismissing the application to vary the award of maintenance is interlocutory. *Menary v. Menary*, [1942] O.W.N. 417, [1942] 3 D.L.R. 746, is distinguishable from the present case, since the order there in question finally determined the right to custody of an infant at the time it was made. Here no change was sought in the right to maintenance, but only in the amount.

G. T. Walsh, K.C., for the appellant, *contra*: This case is indistinguishable in principle from *Menary v. Menary*, *supra*. The orders here appealed from should be considered final, in the sense that they finally dispose of the rights of the parties at the time they were made: *Bassel's Lunch Ltd. v. Kick et al.*, [1936] O.R. 445, [1936] 4 D.L.R. 106; *Hendrickson v. Kallio*, *supra*; *Bozson v. Altrincham Urban District Council*, [1903] 1 K.B. 547; *Millar v. Macdonald* (1892), 14 P.R. 499.

G. A. Gale, K.C., in reply, referred to *Spencer v. The Ancoats Vale Rubber Company Limited* (1888), 58 L.T. 363.

Cur. adv. vult.

4th October 1946. The judgment of the Court was delivered by

HOGG J.A.:—An appeal is taken on behalf of the defendant Howard McCart against an order pronounced by Wilson J. on the 24th June 1946, upon the application of the plaintiff, appointing the Sheriff of the County of York receiver by way of equitable execution in this cause, and a second appeal is taken by the same defendant against a further order of Wilson J., made on the same day, dismissing the application of the defendant for an order reducing the amount of maintenance adjudged to be payable by the said defendant to the plaintiff in the sum of \$150 per month, pursuant to the judgment of Mackay J., dated the 15th January 1936. A motion was made on behalf of the plaintiff, to the Court, for an order quashing the pending appeal by the said defendant from the said order of Wilson J. appointing a receiver as aforesaid, or, in the alternative, removing the stay of execution of the said order created by the appeal.

With respect to the appeal by the defendant McCart against the order appointing an equitable receiver, I have no hesitation in coming to the conclusion that this order is interlocutory, and that therefore, by s. 24 of The Judicature Act, R.S.O. 1937, c. 100, leave of a judge to appeal from it would be required according to the terms and provisions of Rule 493. Section 16 of The Judicature Act provides that a receiver may be appointed by an interlocutory order of the Court in all cases in which it appears to the Court that it is just or convenient that such order should be made.

One of the leading cases in our Courts on the subject of whether an order is final or interlocutory is that of *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580, in which Middleton J.A. reviews the authorities applicable to the question under consideration. At p. 678 that learned judge said:—

“The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties — the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.”

An interlocutory order means, not an order made between the issue of the writ and the final judgment, but an order other than a final judgment or order, and, where a final judgment has been pronounced in an action, an order afterwards obtained

for the purpose of working out the rights given by the final judgment is deemed to be interlocutory: *Blakey v. Latham* (1889), 43 Ch. D. 23; *Leonard et al. v. Burrows* (1904), 7 O.L.R. 316.

Somewhat more difficulty is presented with respect to the question whether an appeal lies as of right from the order dismissing the application to vary the amount of alimony awarded to the plaintiff by the judgment of Mackay J. That judgment dissolved the marriage of the plaintiff and the defendant McCart, and awarded permanent alimony in the sum of \$150 per month. Strictly speaking, alimony could be awarded to a wife only while the marriage existed, and not after it had been dissolved. The right is given by The Matrimonial Causes Act, R.S.O. 1937, c. 208, to the Court to award a sum of money, either in a gross sum or in instalments, to a wife for her maintenance and support although after there has been dissolution of the marriage. It, however, appears to be the common practice for the award under the statute, of maintenance and support, to be called alimony. Under the terms of s. 2 of the Act, the Court may discharge or modify the order directing the payment of a monthly or weekly sum for the support and maintenance of the wife.

The question arises whether the order of Wilson J. dismissing the application to reduce the amount awarded for maintenance and support by the original judgment is a final judgment. The answer to this question, in my opinion, depends wholly on whether that portion of the judgment of Mackay J. which awards alimony or maintenance to the plaintiff is a final judgment. If it is to be held a final judgment, then the order of Wilson J. dealing with the same matter would be final, and there would be, therefore, no need for the defendant to request leave to appeal.

A case which is often cited in our Court is that of *Maguire v. Maguire* (1921), 50 O.L.R. 100, 64 D.L.R. 564, a judgment of the Appellate Division. By a judgment obtained in the State of Minnesota, one of the United States of America, a certain sum was awarded for alimony, and it was held in an action upon the foreign judgment that a decree for alimony was not an absolute or final judgment. Riddell J., basing his opinion on *Aldrich v. Aldrich* (1893), 24 O.R. 124, states that a decree for alimony is not an absolute judgment. Middleton J. makes the following

observation at p. 103, in discussing the case of *Nouvion v. Freeman et al.* (1889), 15 App. Cas. 1:

“It will also be observed that there is no distinction between an action upon a foreign and upon a domestic judgment. A lack of finality is fatal in either case.”

Meredith C.J.C.P. dissented from the majority of the Court, and held that the appeal should be allowed.

In the *Aldrich* case, *supra*, the plaintiff had recovered a judgment for alimony and costs. Several instalments of alimony were unpaid, but the plaintiff abandoned the claim for overdue alimony and sued in the Division Court for \$100 of costs. It was held that the Division Court had jurisdiction to entertain the action. Boyd C. does not in direct language express the opinion that a judgment for alimony is not a final judgment, but holds that costs could be severable from the claim for instalments of alimony and form a distinct claim of debt.

Meredith J. states that an alimony judgment in this Province is enforceable by the same proceedings as for enforcing any other legal claim and judgment thereon, and is thereby “different from a decree for alimony of the Divorce Court in England” under The Matrimonial Causes Act, 1857, c. 85, and a judgment for alimony stands “upon the like footing, in this respect, as common law judgments”. I would conclude from the judgment of Meredith J. that he was of the view that a judgment for alimony was to be regarded as a “final judgment”.

The practice of the English courts in matters pertaining to divorce was not introduced into, and does not govern divorce actions in Ontario: *Howe v. Howe et al.*, [1937] O.R. 57, [1937] 1 D.L.R. 508. The procedure in this Province relating to the enforcement of judgments for support and maintenance or alimony is not the same as the English practice.

In *Re Gay*, 59 O.L.R. 40, [1926] 3 D.L.R. 349, in the Appellate Division, where also the judgment of a foreign Court was under consideration, Middleton J.A. held that a foreign guardian had no absolute right as such, under the judgment of the foreign Court, in this country, and further said:

“No matter what the form, this is necessarily the case in all orders dealing with the custody of children—they are not in their nature final.”

This judgment would appear to be contrary to the recent decision of the Court of Appeal in *Menary v. Menary*, [1942]

O.W.N. 417, [1942] 3 D.L.R. 746. There the question before the Court was whether a judgment *nisi* in an action for dissolution of marriage, awarding the custody of an infant child to the plaintiff, was a final judgment, or was merely interlocutory, since it was expressed to be made until further order, and The Matrimonial Causes Act provided that orders for custody might be made in the action from time to time. The judgments in *Maguire v. Maguire*, *supra*, and *Re Gay*, *supra*, were referred to in argument. Robertson C.J.O. said that the Court was of opinion that the order sought to be appealed from was not interlocutory, "in the sense of leaving the parties to return and do something more". He continued: "It finally determined rights to custody of the child at the time it was made, and if the applicant's argument were to prevail, there could never be a final order in such cases."

The principle applicable to judgments awarding the custody of infants would be pertinent to judgments awarding alimony.

In *Swaizie v. Swaizie* (1899), 31 O.R. 324, a foreign judgment granting a wife alimony was before the Court. Meredith C.J., afterwards C.J.O., used the following language, at p. 334:

"In support of the objection that the judgment is not a final one, reliance was placed on the provision for the wife applying to the Court to enforce payment of the amount awarded, but the objection is in my opinion unfounded. Tried by the tests to be applied in determining the question of finality according to the adjudged cases which are cited by Mr. Dicey, at p. 417 *et seq.*, where the result of them is stated—the judgment in question is a final one."

The judgment of Meredith C.J. was concurred in by Rose and McMahon JJ. It is to be noted that this judgment is subsequent to the judgment in *Aldrich v. Aldrich*.

Robertson v. Robertson (1908), 16 O.L.R. 170, concerned a motion by the plaintiff for summary judgment in an action upon a foreign judgment for alimony. The Master in Chambers awarded judgment, and an appeal was later heard by Chancellor Boyd. At p. 171 the learned Chancellor said:

"Having considered the effect of the decisions in this country, I do not think I should disturb the Master's judgment. The foreign judgment as to the arrears of alimony is explicit that they are to be paid at a given date and enforceable upon default

by process of execution. The cases seem to regard that (apart from the peculiarities of the English law of divorce and alimony as incident thereto) as a final adjudication as to the past, which, by the effect of the judgment, becomes a debt enforceable by ordinary process as a legal debt . . . Arrears of alimony are held to be a debt, though not a debt at law, in *Linton v. Linton* (1885), 15 Q.B.D. 239, 246. That, no doubt, is the view underlying the English decisions in *Bailey v. Bailey* (1884), 13 Q.B.D. 855, 859, and *Robins v. Robins*, [1907] 2 K.B. 13; but reasons are given by Meredith J., in *Aldrich v. Aldrich* (1893), 24 O.R. 124, 131, for distinguishing judgments for the payment of alimony under our system. That arrears of alimony under a judgment therefor are to be regarded as a finality is evidently the view of Ferguson, J., in the same case as reported in (1893), 23 O.R. 374, 378."

In *Head-Patrick v. Patrick*, 15 Sask. L.R. 304, [1922] 1 W.W.R. 825, 63 D.L.R. 158, in the Court of Appeal of Saskatchewan, Lamont J.A. expresses the following opinion, at p. 307:

"A judgment for the payment of certain sums on specified dates as alimony is, in my opinion, a final judgment on which the plaintiff may issue execution for each such payment as the same becomes due, if unpaid."

It is difficult to accept the judgment in *Aldrich v. Aldrich* as an authority for the proposition that a decree of alimony is not a final judgment, and the statement of Middleton J. in the *Maguire* case, to the effect that there is a lack of finality in regard to a domestic judgment awarding alimony, does not appear to be necessary for the decision of that case.

In my view, the order of Wilson J. dismissing the application of the defendant to vary the amount of alimony awarded to the plaintiff was a final order and leave to appeal is, therefore, not necessary, but the appeal lies as a matter of right.

The appeal of the defendant McCart from the order dismissing the application to vary the amount of maintenance payable to the plaintiff may be set down to be heard upon the merits; the costs of the whole appeal to be then disposed of. The appeal of the said defendant against the appointment of a receiver cannot be entertained without leave. The motion of the plain-

tiff to quash the appeal respecting the appointment of a receiver is allowed with costs.

Orders accordingly.

Solicitors for the plaintiff, respondent: Mason, Foulds, Davidson & Gale, Toronto.

Solicitor for the defendant McCart, appellant: Thomas Delany, Toronto.

[WELLS J.]

Re Devine and Ferguson.

Sale of Land—Option to Purchase—Option Contained in Lease—Tenant Remaining in Possession after Expiration of Term—Whether Option Continued—Rule against Perpetuities.

A lease was made for two years, with an option of renewal for a further year at the same rent. The lease contained a clause giving the lessee an option to purchase the property "at any time after one year's occupancy" for a stated sum. The lease was renewed for a further year, and thereafter, without any further arrangement between the parties, the tenant remained in possession, paying the same rent, which was accepted by the landlord. Nine years after the making of the original lease, the landlord having agreed to sell the land to a third person, the tenant asserted his right under the option.

Held, the tenant had no interest in the land which could preclude the sale agreed upon by the landlord.

Whether or not the option gave the tenant an interest in the land, it was not intended to subsist beyond the currency of the lease (*i.e.*, for the two years of the original term and the additional year of the renewal). It was not one of the terms of the lease which continued when, after the expiration of that period, a tenancy from year to year was constituted by the payment and acceptance of rent, but was a provision outside of the ordinary relations between the landlord and the tenant as such. *In re Leeds and Batley Breweries, Limited and Bradbury's Lease; Bradbury v. Grimble and Company*, [1920] 2 Ch. 548, applied.

Even if this view was wrong, and the option did create an equitable interest in the land which persisted after the termination of the tenancy under the lease, it was void as offending the rule against perpetuities. *Rider v. Ford*, [1923] 1 Ch. 541; *Woodall v. Clifton*, [1905] 2 Ch. 257, applied; *London and South Western Railway Company v. Gomm* (1882), 20 Ch. D. 562, referred to.

A MOTION by a vendor of land under The Vendors and Purchasers Act, R.S.O. 1937, c. 168, for a declaration that an objection to title had been satisfactorily answered.

The contract for sale of the land was made on 16th April 1946. One Quinn, then in possession of the house, asserted that he had a good and valid option to purchase the premises, and intended to exercise that option. The purchaser's solicitor accordingly made a requisition for a "release from occupant or tenant of all his rights to purchase the said property". The

vendor's solicitors answered this requisition by asserting that the option had expired, and therefore did not "form an objection to or a cloud upon our title".

20th May 1946. The motion was heard by WELLS J. in Weekly Court at Toronto.

A. M. Ferriss, for the vendor.

J. Harvey Bone, K.C., for the purchaser.

J. C. Risk, for the tenant.

16th October 1946. WELLS J.:—This is an application under The Vendors and Purchasers Act, R.S.O. 1937, c. 168, for an order declaring that the objection to the title of the vendor to the land in question by the purchaser on the ground that the tenant of the said property, E. J. Quinn, has a valid option to purchase the property, has been satisfactorily answered by the vendor and does not constitute a valid objection to the title, and that a good title has been shown in accordance with the conditions of sale.

Notice of motion was served by the vendor on Walter Peter Ferguson, the purchaser, and on E. J. Quinn, the tenant of the property who claims the benefit of the option. Objection was taken at the commencement of the hearing to the fact that the tenant, E. J. Quinn, was not properly before the Court, and an order was accordingly made adding Eugene J. Quinn as a party to the proceedings and directing notice to be served on him pursuant to Rule 602. Quinn's counsel, who was in Court, waived further notice and consented to argue the motion on the merits as they appeared to him.

In this case the rights of the parties depend upon the construction of a lease entered into between the vendor and Quinn on the 10th March 1937, covering the lands and premises in question. The lease was for the term of two years from the 1st May 1937, and ended on the 30th April 1939. Rental of \$900 a year was reserved. The lease further provided that: "Lessee shall have the option to renew the lease for a further period of one year at the same rental. In the event of lessee not renting for the third year, he is to notify the lessor within thirty (30) days of the expiration of this lease."

I am advised that the lease was duly renewed for the further year, and that subsequent to that the lease was not further

renewed, but the tenant simply went on paying rent to the landlord after the expiry of the renewed lease without any fresh arrangement being entered into or any fresh understanding being reached between the landlord and the tenant. As I understand it, the tenant then held, and has since held, as a tenant from year to year.

The lease as originally drawn also contained this provision:

"Lessee shall have the option of purchasing the entire property at any time after one year's occupancy for the sum of eleven thousand three hundred dollars (\$11,300) and the full rent paid for the previous six months shall apply as a part payment and be deducted from the above sum of eleven thousand three hundred dollars."

The tenant now purports to assert this option and takes the position that the option was continued after the expiry of the renewed lease as a term of the tenancy from year to year and that his option is still in existence; that he is now entitled to exercise it; and that in effect he has an interest in the land thereunder.

Preliminary objection was taken before me that a question of this sort was not a proper one to determine on a vendor and purchaser application. I must confess that I have some doubt as to this. On reflection, however, I am of opinion that the vendor and purchaser are entitled to have it determined in these proceedings whether there is an outstanding and enforceable interest in the land which might preclude a conveyance as contemplated by the agreement for sale between the vendor and purchaser. I am assured by all counsel that all the facts have been disclosed to me in the affidavits of Quinn and Devine, filed. Also, as I understand the situation, there was no discussion by Quinn and Devine of the above clause in the lease from the time it was given up to the time that Quinn learned of Devine's sale to Ferguson, at which time he attempted to exercise the option. On this basis I have been asked by counsel for all parties to deal with the matter either under The Vendors and Purchasers Act or as if it were an application under Rule 605; the question being whether on a proper construction of the lease and on the facts as disclosed, the option is still in force and effect in such a manner as to give Quinn an interest in the land prior to the purchaser. I do this only on the understanding that all parties are consenting to such an adjudication.

In the view I take of the matter it is not necessary to determine whether or not the option clause in the lease created an actual and existing interest in the lands, vested in Quinn. Much learning and some heat has been engendered by a discussion of this problem: see 35 C.L.T. 798, 36 C.L.T. 446, 38 C.L.T. 242 and 322. To my mind, the option in question is concerned with something wholly outside the relation of landlord and tenant. The lease was renewed once under the renewal clause in the lease, and then nothing further took place between the parties, and on the payment of rent the tenant became a tenant from year to year of the landlord. It was one thing to give the tenant in this case the right to exercise an option to purchase during the currency of the lease after renting the property for one year, but it is a very different thing to suppose that the landlord or the tenant intended, at the time the lease was entered into, to confer upon the tenant a right to purchase at the price set out in the option, although the right might not be exercised for many years. In my opinion the option to purchase was not one of the terms of the lease which continued when the tenancy from year to year was created. It was a provision outside of the ordinary relations between the landlord and the tenant as such. A somewhat similar situation was considered in the case of *In re Leeds and Batley Breweries, Limited, and Bradbury's Lease; Bradbury v. Grimble and Company*, [1920] 2 Ch. 548. The headnote in respect of that case is as follows:

“An option contained in a lease to purchase the reversion and so destroy the tenancy is not one of the terms of the tenancy. It is a provision outside of the terms which regulate the relations between the landlord as landlord and the tenant as tenant, and is not one of the terms of the original tenancy which will be incorporated into the terms of the yearly tenancy created by the tenant holding over after the expiration of the lease.”

In that case, the lease contained a proviso that if the lessee should be desirous of purchasing the unexpired residue of the leasehold reversion granted for a term of 999 years by a lease dated the 16th May 1893, at the price of £3,000, and should “at any time six calendar months before the determination of this lease” give to the lessors a written notice to that effect, then in such case the person giving such notice should be the

purchaser of the unexpired residue of the term at the price of £3,000.

I have not forgotten that in that case there was a time limit set on the exercise of the option at a period prior to the expiry of the lease. At p. 553, Peterson J. said, quoting the judgment of Romer L.J. in the decision of *Woodall v. Clifton*, [1905] 2 Ch. 257:

"Romer L.J. in delivering the judgment of the Court said: 'The covenant is aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. Properly regarded, it cannot, in our opinion, be said to directly affect or concern the land, regarded as the subject-matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so.' Then after some other observations which relate to the statute of Henry VIII, he says: 'An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry though the result of the option, if exercised, would or might be to destroy the tenancy. It is, to our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII was dealing.' In my opinion the option in this case is a matter that is wholly outside the relation of landlord and tenant, and therefore is not one of the terms of the original tenancy on which the lessee held the property when he became tenant from year to year.

"The result therefore is that this option is not now exercisable."

In respect of the option in the lease before me, the reasoning in that case appeals to me as sound, and my own view is that it was not intended to extend beyond the currency of the lease, which in my view expired after the end of the third year.

If, however, I am wrong in this opinion, and if the correct view is that an interest in the land was given to Quinn by the option, then it would seem to me that the clause in question is void as offending against the rule against perpetuities. In *Rider v. Ford*, [1923] 1 Ch. 541, Mr. Justice Russell discusses the decision of Mr. Justice Peterson just quoted, points out that in his view that decision has no application to a case where the

option is not limited in time, which is the case in the option before me, and that in such case the true view is, as appears in the authorities to which he refers, that an option unlimited in time exists so long as the relationship of landlord and tenant continues. This view, however, is qualified in that the right to exercise this option is subject to any effect which the rule against perpetuities may have. At p. 546, he says:

"Defendant's counsel admits that the rule against perpetuities must render invalid the option to purchase the freehold unless the agreement is read as giving only an option to the defendant personally, or to an assignee of the defendant, but only exercisable during the defendant's life. In my opinion the agreement cannot be read in that way and therefore I hold that the option to purchase the freehold is inoperative and invalid because of the rule against perpetuities."

One of the most helpful decisions in support of this view is the decision of Warrington J. in *Woodall v. Clifton, supra*. In that case a lease for 99 years, granted in 1867, contained a proviso that in case the lessee, his heirs or assigns should at any time during the term be desirous of purchasing the fee simple of the land at the rate of £500 per acre, the lessor, his heirs or assigns, on receipt of the purchase money, would execute a conveyance of the land in favour of the lessee, his heirs and assigns. In 1904 an action was brought by an assignee of the lease, who had given notice of his desire to exercise the option against assigns of the lessor, to compel a conveyance of the land accordingly. One of the grounds for the decision was that the option to purchase was invalid on the ground of remoteness. Mr. Justice Warrington discussed the situation in view of the earlier decision in *London and South Western Railway Company v. Gomm* (1882), 20 Ch. D. 562, which he thought governed. The view taken there was that the right to call for a conveyance of the land was an equitable interest or an equitable estate.

The right given in the lease in question before me, however, is not so definite. It is simply a right of purchasing the property after one year's occupancy for the price set out, but if the effect of this option is to create an interest in land, then I think, as Warrington J. pointed out at p. 262 in quoting from the *Gomm* decision, that if such an interest was created it was perfectly clear that the covenant violated the rule against per-

petuities. A perpetuity was defined as “ . . . a future limitation restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined.” The judge then continued: “Now this covenant plainly would restrain the future owner from aliening the estate to anybody he pleases, it restricts him to aliening it to the railway company in the event of the company exercising their option.” These observations in my view apply to the option in the lease presently under consideration. The decision of Warrington J. in *Woodall v. Clifton* was appealed and while the point as to the application of the rule against perpetuities was not considered, it was not dissented from. In my view therefore, if my earlier construction of the lease in question is wrong, the option is still unenforceable as being one creating an interest in the lands which offends the rule against perpetuities.

An order should therefore go, declaring that the vendor has satisfactorily answered the purchaser's requisitions on title. In coming to this conclusion I expressly desire to be understood as not having adjudicated in any way upon any rights which Quinn may or may not have personally against Devine arising from breach of contract or otherwise. I am expressing no opinion in connection with these matters whatever. There will be no order as to costs.

Order accordingly.

Solicitors for the vendor, applicant: Garvey & Ferriss, Toronto.

Solicitor for the purchaser: J. Harvey Bone, Toronto.

Solicitors for the tenant: McNish & Risk, Toronto.

[COURT OF APPEAL.]

Kent v. Bell and Bell.

Master and Servant—Whether Relationship Exists—Tenant Assisting Landlord's Agent in Construction Work on Rented Premises—The Workmen's Compensation Act, R.S.O. 1937, c. 204.

Negligence—Dangerous Premises—Basis of Liability to Invitee—Sufficiency of Evidence.

An addition was being built to a house occupied by the plaintiff as tenant of a married woman, W. The addition had been requested by the plaintiff, and the construction work had been entrusted by W to her husband H, who had had considerable experience in such work. At H's request, the plaintiff left his own employment one afternoon, and assisted H in the building of the roof on the extension. While so employed, he fell to the ground and was injured. He sued both W and H.

Held, by the majority of the Court, the action must be dismissed.

Per HENDERSON and HOGG J.J.A.: There was no relationship of master and servant between the plaintiff and either of the defendants. Such a relationship was not to be presumed where, as here, the circumstances (particularly the fact that there was no evidence of any arrangement for payment for the plaintiff's services) tended rather to rebut the presumption. *Morris v. Hoyle* (1878), 28 U.C.C.P. 598; *Archer v. The Society of the Sacred Heart of Jesus* (1905), 9 O.L.R. 474, applied. This being the case, it was unnecessary to consider either the defence of common employment or the application of The Workmen's Compensation Act. The plaintiff might be regarded as standing to H in the relation of invitee to invitor (*The W. J. McGuire Company v. Bridger* (1914), 49 S.C.R. 632; *Reid v. Town of Mimico* (1927), 59 O.L.R. 579, applied), but H's obligation was only to use reasonable care to prevent injury from unusual danger of which he knew or ought to have known, and to take reasonable care that the premises were safe. *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, affirmed (1867), L.R. 2 C.P. 311; *Marney v. Scott*, [1899] 1 Q.B. 986, applied. There was no evidence to justify a finding that H had failed in his duty in these respects.

Per ROACH J.A., *dissenting*: The trial judge had properly found that the plaintiff had been engaged by H as agent for W, and it was reasonable to assume that payment was contemplated for his work. The plaintiff was therefore a "workman", and W was his "employer", within the meaning of The Workmen's Compensation Act, and the plaintiff was entitled to the benefit of Part II of that Act. It followed that he had a cause of action, on the trial judge's findings of fact, against W, and, since the cause of action was statutory, the defence of common employment was inapplicable. There being evidence to support the trial judge's findings of negligence against H, the plaintiff had also a right of action against him at common law, and to this action common employment was not a defence.

AN APPEAL by the defendant from the judgment of Wilson J. in favour of the plaintiff. The facts are stated in the reasons for judgment.

19th September 1946. The appeal was heard by HENDERSON, ROACH and HOGG J.J.A.

J. R. Cartwright, K.C. (*S. L. Chunis*, with him), for the defendants, appellants: Before any finding of negligence can be made, the Court must determine the relationship between the

parties, and what duty, if any, was owed to the plaintiff by the defendants.

The relationship was not that of master and servant. This question is one of mixed law and fact, and in this case there was no contract of employment: see 22 Halsbury, 2nd ed. 1936, pp. 112-3.

The plaintiff was not an employee within the meaning of Part II of The Workmen's Compensation Act, R.S.O. 1937, c. 204, and cannot claim the benefit of that Act, because both parties are farmers: see ss. 120-124.

The lessor cannot be the occupier of property, even while working on it: *Gregson v. Henderson Roller Bearing Co.* (1910), 20 O.L.R. 584. The plaintiff here was the occupier, and the defendant was a mere licensee.

The defendants were under no duty, merely as landlords, to keep the property safe for their tenant, the plaintiff: *Malone v. Laskey et al.*, [1907] 2 K.B. 141; *Bottomley et al. v. Bannister et al.*, [1932] 1 K.B. 458; *Davis v. Foots et al.*, [1940] 1 K.B. 116; *Cavalier v. Pope*, [1906] A.C. 428.

The plaintiff here should be considered as either an independent contractor or a mere volunteer: Salmond on Torts, 10th ed. 1945, pp. 102-3; *Reid v. Town of Mimico*, 59 O.L.R. 579, [1927] 1 D.L.R. 235; *Bass v. Hendon Urban District Council* (1912), 28 T.L.R. 317; *Heasmer v. Pickfords, Limited* (1920), 36 T.L.R. 818; *Hayward v. Drury Lane Theatre, Limited and Moss' Empires Limited*, [1917] 2 K.B. 899; *Degg v. The Midland Railway Company* (1857), 1 H. & N. 773, 156 E.R. 1413; *Switzer v. City of Ottawa*, 63 O.L.R. 168, [1928] 4 D.L.R. 991. The defendants owe him no duty of care in either of these capacities, and therefore there can be no negligence at law and no liability.

D. G. Kerr, for the plaintiff, respondent: The Workmen's Compensation Board held this to be casual employment, and therefore not under Part I of the Act, but we come under Part II and therefore the plaintiff is not faced with the defence of common employment. [ROACH J.A.: Can the building of a roof by the owner on a rented house be called an "industry"?] Yes, see *Wiznoski v. Peteroff et al.*, [1938] O.R. 113, [1938] 2 D.L.R. 205; *The Sheppard Publishing Company, Limited v. The Press Publishing Company, Limited*, (1905), 10 O.L.R. 243; *Carrol v. The Corporation of Plympton* (1860), 9 U.C.C.P. 345; *Whiteley et ux. v. Pepper* (1876), 2 Q.B.D. 276.

[HENDERSON J.A.: Did the plaintiff at any time make a demand on the defendants for wages for that afternoon's work?] No.

The occupier is not the only person liable to other people who come on to land: see Salmond, *op. cit.*, p. 470.

J. R. Cartwright, K.C., in reply.

Cur. adv. vult.

10th October 1946. HENDERSON J.A. agrees with HOGG J.A.

ROACH J.A. (*dissenting*):—This is an appeal by the defendants from the judgment pronounced by the Honourable Mr. Justice Wilson following the trial of this action at the city of Chatham without a jury, by which it was adjudged, *inter alia*, that the plaintiff recover from the defendants the sum of \$5,271.75 damages.

The defendants are husband and wife. The husband was described in evidence by his wife as a farmer and carpenter, and on his own evidence he had considerable experience in carpentry construction. The defendant wife was the owner of certain farm lands in the township of Tilbury East, and at the time in question in this action, and for some several years earlier, the plaintiff occupied the said farm lands and buildings as her tenant on a crop-sharing basis. On or about the 9th October 1943 the plaintiff was engaged in assisting in the construction of a roof on an addition to the dwelling on the said farm. On that day, while so engaged, he fell from the roof, and he subsequently brought this action to recover damages for injuries sustained, alleging that the defendant wife had negligently entrusted the construction of the addition to the dwelling to the defendant husband, who was not properly qualified to do the work, and that the plaintiff was injured due to his negligence.

The learned trial judge has made no finding as to the qualifications of the husband, but he has found as a fact that he was negligent toward the plaintiff and that his negligence caused the plaintiff's injuries. On conflicting evidence he has found specifically that the husband, as the agent of his wife, engaged the services of the plaintiff to assist in the completion of the roof; that pursuant to such employment the plaintiff proceeded to the roof on the afternoon in question and had nailed some sheeting boards to the rafters and then, following a direction from the

husband, who was also working on the roof at the time, was proceeding from the roof to the ground for the purpose of handing up some boards for sheeting; that he backed carefully down the side of the roof to the edge thereof and there he placed his weight on a fascia board which had been nailed to the end of the rafters by the defendant husband; that the fascia board had not been securely nailed, and gave way under the weight of the plaintiff, and that without any negligence on the plaintiff's part he fell to the ground. On these findings of fact the learned trial judge held the defendant husband liable as agent, and his wife liable as principal.

In my opinion the learned trial judge was right in finding as he did that the defendant husband was the agent of his wife. Certainly he was not an independent contractor on this job. She had left the matter of the actual construction of the addition to him, as might be expected, without specific directions as to the time he should devote to the work or the manner in which he should do it, but as owner she would be entitled at any time during the construction of the work to give directions as to how the work should be done, if she so chose.

Counsel for the appellants argued in this court that the relationship of master and servant did not exist between the plaintiff and either of the defendants. I disagree with that contention. I think it should be concluded on the evidence that the defendant wife, through the agency of her husband, did employ the plaintiff under an express contract of hiring to do manual labour in the course of such construction, although the amount of wages to be paid for such services was not expressly stated.

The plaintiff, while his main occupation may have been that of farmer operating this farm, was from time to time employed in a factory. For some time prior to the day in question he had been working in the plant of the Canadian Top and Body Corporation as a welder's helper and fitter, earning wages varying from \$8 to \$9.60 a day. The accident occurred on a Saturday. On the Friday previously the defendant husband had asked the plaintiff if he would be working the following day. The plaintiff replied that in all likelihood he would be working. The defendant husband then stated that he wanted the plaintiff to assist in the construction of the roof because, as he put it: "We want to get as much of the roof done over the week-end as we possibly can." The plaintiff agreed by saying: "I guess I will have to help." The

following morning he went to work in the factory, but quit at noon.

This was not the first occasion on which the plaintiff had been employed casually to work for either of the defendants, and on each of the other occasions he was paid in cash. I think it would be unreasonable to assume, while this subject of wages was not discussed on this particular occasion, that the plaintiff did not expect to be paid, or that the defendant husband, as agent for his wife, did not expect to pay him. The plaintiff was losing the wages which he would otherwise have been earning on that particular afternoon at the factory, and while, as it appears from the evidence, he was anxious that the addition to the dwelling should be completed, I do not think it should be concluded that he was to do the work without being paid therefor.

The plaintiff has pleaded The Workmen's Compensation Act, R.S.O. 1937, c. 204, and in this court his counsel argued that the plaintiff came under Part II of that Act. Counsel for the appellants argued that the Act had no application. Obviously, by reason of s. 2(4), Part I of the Act has no application. Section 121(1), which is in Part II, reads as follows (omitting the irrelevant part):

"Where personal injury is caused to a workman . . . by reason of the negligence of his employer or of any person in the service of his employer acting within the scope of his employment, the workman . . . shall have an action against the employer, and . . . shall be entitled to recover from the employer the damages sustained by the workman by or in consequence of the injury".

Was the respondent a "workman" and was the appellant wife an "employer"?

Section 1(f) provides that: "'Employer' shall include every person having in his service under a contract of hiring or apprenticeship, written or oral, express or implied, any person engaged in any work in or about an industry . . ."

Section 1(p) provides that: "'Workman' shall include a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour, or otherwise . . ."

Section 1(i) provides that: "'Industry' shall include establishments, undertaking, trade and business."

I am not in any doubt that at the time and place in question, the respondent was a workman employed by the defendant wife

and engaged in the work of an industry as a manual labourer, the industry coming within class 24 of Schedule 1 of the Act, namely, structural carpentry.

I disagree with the contention put forward by counsel for the appellants that the respondent is excluded from Part II of the Act by virtue of s. 120. That section reads as follows:

“Subject to section 124, [which excludes from the operation of the Act the industry of farming and domestic or menial servants and their employers] sections 121 to 123 shall apply only to the industries to which Part I does not apply and to the workmen employed in such industries, but outworkers and persons whose employment is of a casual nature and who are employed otherwise than for the purposes of the employer's trade or business, who are employed in industries under the operation of Part I but who are excluded from the benefit of the provisions of Part I, shall not by this section be excluded from the benefit of the provisions of sections 121 to 123.”

The plaintiff's employment at the time and place in question was of a casual nature. His employer had no trade or business. She was merely a housewife, and, as I interpret the section, it excludes those employed for the purposes of the employer's trade or business but includes all others who otherwise qualify thereunder. To hold otherwise would mean that if, here, Mrs. Bell, for example, was engaged in the milling business, she would be liable, but by the mere incident that she was not engaged in any trade or business, she would not be liable. That to my mind is not the interpretation which should be given to the language of the section, nor is it consistent with the scheme and intention of the Act. The whole scheme of the Act is to classify all industries excepting those excluded by s. 124, and to give certain protection to those employed in such industries. This section brings under the protection of Part II at least, *inter alia*, those who are excluded from the protection of Part I by virtue of s. 124, so that both these sections are to be read as though after the words “employer's trade or business” were added the words “if any”. In my opinion Part II of the Act is applicable, and the plaintiff, by virtue of s. 121, has a cause of action against the defendant wife as his employer.

The plaintiff's right of action against the defendant wife as his employer is statutory. No such right existed under the common law by reason of the doctrine of common employment. At

common law, however, the injured workman had a cause of action against a fellow-workman by whose negligence, in the course of his employment, he was injured. On the assumption that there was negligence on the part of the defendant husband, the plaintiff is therefore entitled to succeed as against the wife under the statute and as against the husband under the common law.

On the argument in this court, counsel for the appellants, while not admitting that the plaintiff's injuries were brought about by the specific negligence as found by the trial judge, or any negligence on the part of the defendants, argued that even if the findings of fact of the trial judge were to be accepted, the action did not lie. I have disposed of that contention, and I turn now to consider whether or not there was any evidence that would justify the finding of negligence as made by the learned trial judge, and content myself by saying that there was evidence which, if accepted, justified such a finding. I merely summarize it, namely, that, as put by one expert called by the plaintiff, to leave a fascia board fastened as the learned trial judge has found this one was insecurely fastened, is to create a "booby trap"; that having been put in position, it should have been nailed securely, because men working on the roof take it for granted that everything is as it appears, and if they had to stop to examine each board before putting their foot on it, not much work would be accomplished. A scaffold had been erected along the side of the house a few feet below the level of the end of the rafters, and it was reasonable that a workman or anyone else climbing from the roof, and having reached the edge of the roof, would put considerable weight on the fascia board in his manoeuvring to get his feet on the scaffold.

There being evidence to justify the finding of negligence, this Court should not interfere with such finding. In the result, the defendants' appeal should be dismissed with costs.

HOGG J.A.:—I have had the privilege of reading the reasons for judgment of my brother Roach, which are written in his usual clear and lucid style, but, with regret, I am unable to agree with his determination of the question in issue in this appeal. I have reached the conclusion that the relationship of master and servant did not exist between either of the appellants and the respondent at the time of the accident in connection with the

assistance rendered by the respondent in the construction of the roof in question. Such being the case, neither the doctrine of common employment nor the effect of The Workmen's Compensation Act would be material or pertinent to the issues involved in the action.

It will perhaps assist in the discussion of the matter to state again that the appellant Charlotte Bell was the owner of the building, the roof of which is a material factor in this appeal, that the appellant Archibald R. Bell was her husband, who had the construction of the said roof in charge, and that the respondent Kent was the tenant of Mrs. Bell and the occupier of the aforesaid house. The appellant Archibald Bell told the respondent he wished to have the respondent's assistance for a Saturday afternoon in the construction of the roof and the respondent replied "I guess I will have to help", and he did so help in the necessary carpentry work. These are the circumstances upon which the respondent purports to found a contract of hiring.

It is said in Smith on Master and Servant, 8th ed. 1931, at p. 37, that a contract of hiring cannot be presumed where the circumstances rather tend to rebut such a presumption. One of the circumstances present which might be said to tend to rebut such a presumption, although perhaps only in some slight degree, is the fact that the respondent lived in the house, the roof of which was being repaired by Archibald Bell. The respondent would have an interest in having the roof of this particular house repaired. Another circumstance which rebuts such a presumption strongly is that there is no evidence of any payment of any nature or kind to be made by the appellants or either of them to the respondent, or to be received by the respondent, at any time, for his help on this Saturday afternoon.

In *Morris v. Hoyle* (1878), 28 U.C.C.P. 598, the facts, in brief, were that the plaintiff had worked for some time on his uncle's farm without any contract of hiring, and was told that if he behaved well he would eventually have what might be left on the death of the uncle and his wife. The parties quarrelled and parted, and the plaintiff sued his uncle for the value of his services during the last three years he had worked on the farm. It was held that the relationship of master and servant never existed between the parties. Hagarty C.J. said, at p. 600:

"It is not easy to see how the relation of master and servant ever existed between these parties, or how in any view of the

case the plaintiff can recover on the common counts for work and labour, payable in money . . . But at that time the answer would have been complete, viz., that there never was any contract thought of to pay for services, and the defendant could have said that he fully intended doing as he originally said, viz., leaving the place to the plaintiff." And further, at p. 602: "There may be an apparent hardship in many cases, but it is all important to avoid inventing contracts for people who never either entered or thought of entering into them."

In *Archer v. The Society of the Sacred Heart of Jesus* (1905), 9 O.L.R. 474, in the Court of Appeal, Osler J.A. said, at p. 480:

"What then, was the plaintiff's status? Certainly the relations between herself and the Community was not that of master and servant, or of hiring and service. She herself admits that she was not serving for wages and that she was not receiving, or to receive, any other compensation than that of board, lodging and clothing, and the right of proceeding to take her final vows in the manner and by passing through the degrees provided for by the rules or constitution of the Society.

"There was therefore no right to wages for past services in the institution or to damages, as for dismissal from any contract of service."

Connolly, in his book on *The Workmen's Compensation Acts, 1906-1923*, at p. 33, in discussing the meaning of "workman" in the English statutes, says that in order to determine whether or not one is a workman, consideration must be given to the following factors: (1) the character and terms of the engagement; (2) the payment of wages or remuneration; (3) the power of dismissal; and (4) the power of controlling the work.

I do not think that it is open for the Court to speculate as to what the relationship was between the parties in respect of the work in which the respondent assisted, or to assume that wages or remuneration of any kind were to be paid or given to the respondent by either of the appellants for the help that he gave to Bell on a Saturday afternoon in the work of constructing the roof of the extension or enlargement of the house in which he himself lived. To use the language of Hagarty C.J. in the *Morris* case, it is not easy to see how the respondent could recover for work and labour, payable in money.

The question whether there was negligence for which the appellants would be liable remains to be considered. Although

the relationship of master and servant did not exist, and therefore, in that regard, the respondent was not in the employ of the appellants, the respondent was nevertheless invited to help in the work upon the roof by the appellant Archibald Bell. It is true that the respondent, being the tenant of the house, would not require an invitation to go upon its roof, but I think the circumstances of this particular case may be looked upon in the light that the appellant Archibald Bell was in possession and control of the roof of the extension of the house while it was being constructed, and that therefore the respondent may be regarded as having the same relationship to the appellant Bell as an invitee would have to an occupier.

Beven on Negligence, 4th ed. 1928, p. 577, in speaking of the rule laid down by Willes J. in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, affirmed (1867), L.R. 2 C.P. 311, says:

"The rule, then, may be thus stated, that persons inviting others not only on their own premises, but upon any premises, are answerable for anything in the nature of a trap existing in the means they afford for going upon such premises, or while they are there."

Duff J. (afterwards C.J.C.) in *The W. J. McGuire Company v. Bridger* (1914), 49 S.C.R. 632 at 644, 20 D.L.R. 45, expressed the following opinion:

"Then comes the question as to whether there was evidence of negligence. Now I think the test to be applied is this. The owner of the building as occupier owed a certain duty to persons invited to come upon the premises in the ordinary course of business. I think that, as regards positive acts, the responsibility of the concrete contractors would be the same as that of the owner, and I think, also, that any other person engaged in the work of construction, as the appellants were, would be under precisely the same responsibility as to his own positive acts, in relation to such persons as the owner would be."

In *Reid v. Town of Mimico*, 59 O.L.R. 579, [1927] 1 D.L.R. 235, Masten J.A. quotes a passage from Pollock on Torts, 11th ed., p. 512, setting out that the duty as expressed in *Indermaur v. Dames* "is founded not on ownership, but on possession, in other words, on the structure being maintained under the control and for the purposes of the person held answerable", and he also cites the opinion of Ferguson J.A. in *Great Lakes Steamship Co. v. Maple Leaf Milling Co. Limited*, 54 O.L.R. 174 at 183,

[1923] 3 D.L.R. 308 (reversed on other grounds 41 T.L.R. 21, [1924] 4 D.L.R. 1101), "that *Indermaur v. Dames* is based on invitation coupled with occupancy and control of the premises in question."

This question of possession and control of premises is also considered in *Marney v. Scott*, [1899] 1 Q.B. 986, by Bigham J. at p. 993.

The premises as a whole were occupied by the respondent as a tenant, but, for the purposes of repairs to the roof, that particular part of the premises was, at the time of the accident, in the possession and under the control of the appellant Archibald Bell. If that is a proper conclusion to draw from the circumstances, then, as Masten J.A. states the rule to be in *Indermaur v. Dames*, the invitee would not be "entitled to find a state of positive safety but only to warning of any unusual danger incident to the nature and uses of the place".

The person extending the invitation must use reasonable care to prevent injury from unusual danger, of which he knows or ought to know, and must take reasonable care that the premises are safe. Persons invited to be present on the premises are entitled to assume that they will not encounter perils not apparent to persons exercising such care as in the circumstances would be reasonable. This principle is considered in *Marney v. Scott*, *supra*.

In the present case the evidence shows that the respondent had some knowledge of carpentry work, even if that knowledge was not extensive.

The facia board in question, which had been nailed to the end of the rafters by the appellant Archibald Bell, was in plain and open view. It was not necessary to step on this board in order to get down from the roof. There is evidence that a person could get down from the roof in safety by using part of the structure called the "plate" in stepping from the roof-boards to the scaffolding. I do not think the presence of the facia board constituted a trap.

There is also some evidence that the respondent slipped on the roof, could not regain control over himself, and so fell to the ground.

I think the appeal should be allowed and the action should be dismissed, with costs of the trial and the appeal.

Appeal allowed with costs and action dismissed with costs, ROACH J.A. dissenting.

Solicitors for the plaintiff, respondent: Kerr & Kerr, Chatham.

Solicitors for the defendants, appellants: Clunis & Kee, Chatham.

[COURT OF APPEAL.]

W. R. Johnston and Company Limited et al. v. Inter-City Forwarders Limited et al.

Carriers—Liability—Special Limitation in Bill of Lading—"Loss or Damage" exceeding Stated Amount—Theft by Carrier's Employee—The Commercial Vehicles Act, R.S.O. 1937, c. 290.

The regulations made under The Commercial Vehicles Act prescribe a compulsory form of bill of lading, containing, *inter alia*, a condition limiting the carrier's liability for "any loss or damage . . . whether or not such loss or damage occurs from negligence" to the value of the goods as declared by the shipper, or, if no value is declared, to \$40 per hundred pounds of weight.

Held, this condition applies to a loss resulting from theft of goods by a carrier's employee, such theft being within the plain meaning of the words "loss or damage". *Shaw v. The Great Western Railway Company*, [1894] 1 Q.B. 373, applied; *Steinman & Co. v. Angier Line, Limited*, [1891] 1 Q.B. 619, and other authorities, discussed. The contract being prescribed by the equivalent of a statute, no question can arise as to its reasonableness, or as to its being contrary to public policy. Where, therefore, the shipper does not declare any value for his goods, the carrier's liability, in case of theft by its employee, is limited in accordance with the condition.

Costs—Payment into Court—Tender before Action—Plaintiff Recovering only Amount Paid in.

Where a defendant admits liability in an amount less than that claimed by the plaintiff, pays that sum into court with his defence, and pleads tender thereof before action, and the plaintiff at the trial recovers only the amount so tendered and paid in, the defendant will be entitled to his full costs of the action. *The American Aristotype Co. v. Eakins* (1904), 7 O.L.R. 127, applied.

AN APPEAL by the defendants from the judgment of Barlow J., [1946] O.W.N. 429, [1946] 3 D.L.R. 142, 59 C.R.T.C. 337, in favour of the plaintiffs. The facts are stated in the reasons for judgment.

18th September 1946. The appeal was heard by HENDERSON, ROACH and HOGG JJ.A.

D. J. Walker, K.C., for the defendants, appellants: The bill of lading, having statutory authority, cannot be said to be contrary to public policy and must be construed in the same way as

a statute: *Grand Trunk Railway Company of Canada v. Robinson*, [1915] A.C. 740 at 747, 22 D.L.R. 1, 31 W.L.R. 241, 19 C.R.C. 37.

The words "any loss or damage" in s. 4(b) of the conditions are clearly wide enough to include theft by the carrier's employee: *Shaw v. The Great Western Railway Company*, [1894] 1 Q.B. 373; *Butt et al. v. The Great Western Railway Company* (1851), 11 C.B. 140, 138 E.R. 424.

The learned trial judge treated s. 4(b) as exempting us from liability in the cases it covered, but this is not correct. We admit liability, but only to the amount set out in the condition. The valuation of the goods, and the risk assumed by the carrier, are important matters; we could not afford to carry, and be responsible for, valuable goods at the low rates charged.

Steinman & Co. v. Angier Line, Limited, [1891] 1 Q.B. 619, relied on by the trial judge, is not an authority here. That case was decided on grounds of public policy which are inapplicable in the case of a statutory contract.

I. Levinter, K.C., for the plaintiffs, respondents: At common law a carrier was an insurer of goods delivered to him: *Garnett et al. v. Willan and Jones* (1821), 5 B. & Ald. 53, 106 E.R. 1113; *Sleat v. Fogg* (1822), 5 B. & Ald. 342, 106 E.R. 1216. The statutory contract here in question must be construed as not changing the common law except by clear and unambiguous language.

Steinman & Co. v. Angier Line, Limited, supra, was not decided on grounds of public policy, but is an authority directly in our favour, since it was expressly held that general words relieving a carrier from liability did not cover default or misfeasance by the carrier or his servant. See also *Price & Co. v. Union Lighterage Company*, [1903] 1 K.B. 750.

As to the meaning of the words "loss or damage" we rely on *Wilson v. The Canadian Development Company* (1903), 33 S.C.R. 432; *Porter & Sons v. Muir Brothers Dry Dock Co. Ltd.*, 63 O.L.R. 437, [1929] 2 D.L.R. 561; *Allen v. Canadian Pacific R.W. Co.* (1910), 21 O.L.R. 416, 10 C.R.C. 424; *Williams v. The Curzon Syndicate (Limited)* (1919), 35 T.L.R. 475.

The carrier here agreed to carry and deliver the goods at their destination, but failed to do so, and there has clearly been a breach of the contract. Since a company can act only through

servants or agents, the position should be considered exactly as if the defendants themselves had stolen the goods.

D. J. Walker, K.C., in reply.

Cur. adv. vult.

10th October 1946. HENDERSON J.A.:—An appeal from the judgment of the Honourable Mr. Justice Barlow dated 11th April 1946, whereby the plaintiffs recovered judgment for \$796.66 and costs.

The facts are not in dispute. The claim of the plaintiffs is to recover the sum named, being the value of goods shipped (less certain goods returned) by the plaintiff W. R. Johnston and Company Limited to the plaintiff Greenway's Clothes Shop by motor truck owned and operated by the defendants.

The goods (two cartons of clothes) were shipped from Toronto pursuant to a bill of lading, and reached Windsor, but instead of being delivered to the plaintiff Greenway's Clothes Shop, the consignee, were sold and appropriated to his own use by the driver of the defendant's truck.

The point at issue is the proper construction of the bill of lading, which is ex. 7, and by which the plaintiff W. R. Johnston and Company Limited consigned to Greenway's Clothes Shop at Windsor the two cartons of clothing in question.

Upon the face of the bill of lading it is provided:

"that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, including conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns."

Also on the face of the bill of lading, and below the description of the goods, appear the words "Valuation \$....." and underneath that: "Note carefully condition 4(b) on back hereof." The shipper placed no valuation on the goods.

Condition 4(b) reads as follows:

"(b) The amount of any loss or damage for which any Carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under this bill of lading (including the freight and other charges if paid) unless a lower value has been represented in writing by the shipper or has been agreed upon, in any of which events such lower value shall be the amount to govern such computation, whether or not such

loss or damage occurs from negligence, except that the Carrier shall not be liable for loss or damage for any amount in excess of \$40.00 per hundred pounds unless a higher value is declared on the face of this bill of lading."

The bill of lading is in accordance with the regulations under The Commercial Vehicles Act, R.S.O. 1937, c. 290, made by the Motor Vehicles Branch of the Department of Highways, Toronto, and therefore has the authority of a statute, and my understanding is that the carrier who is licensed under that statute is obliged to comply with the regulations and to use this form of bill of lading, or failing that he becomes disentitled to his licence.

It will be noted that condition 4(b) is restricted entirely to the government of the amount of any loss or damage for which the carrier is liable. The defendants do not dispute their liability as carriers, but their entire defence to the action is that the loss or damage for which they are liable is governed by this condition, by which the amount is limited to \$40 per hundred pounds, and as the shipment in question weighed 175 pounds, the defendants brought into court with their defence \$70.

The case was fully argued on both sides by able counsel, and many authorities were cited, and in my opinion the words of condition 4(b) are plain and unambiguous and I accept the construction contended for by the defendants' counsel.

The case of *Shaw v. The Great Western Railway Company*, [1894] 1 Q.B. 373, is an authority in the defendants' favour, as is also *Butt et al. v. The Great Western Railway Company* (1851), 11 C.B. 140, 138 E.R. 424.

I accept Mr. Walker's argument that inasmuch as the document in question has the sanction of statutory authority, no question of public policy arises, and the parties are to stand or fall on the terms of their contract.

I would therefore allow the appeal with costs, and set aside the judgment in the court below, and substitute therefor judgment in favour of the plaintiffs for \$70, moneys in court. The defendants have brought this sum into court with a plea of tender before action, and will, therefore, have judgment for their costs of the action in addition to the costs of the appeal.

ROACH J.A.:—I have had the privilege of reading the reasons for judgment of my brothers Henderson and Hogg. I agree with

the conclusions reached by them for the reasons stated by them, and have nothing further to add.

HOGG J.A.:—This is an appeal by the defendants from a judgment of Barlow J., awarding the respondents the sum of \$796.66 as the value of certain goods shipped from Toronto to Windsor, Ontario, by the respondent W. R. Johnston and Company Limited, by motor truck of the appellants. The aforesaid goods were stolen by the driver of the appellants' truck and so were not delivered to the respondent Greenway's Clothes Shop. The issue between the parties is concerning the interpretation to be placed upon certain provisions of the contract between the shipper, the respondent W. R. Johnston and Company Limited, and the carrier, the appellant Inter-City Forwarders Limited, which is in the form of a bill of lading, dated the 23rd March 1945.

The value of the goods was not stated by the respondents in the bill of lading, and the appellants claim that because of s. 4(b) of the conditions which form part of the contract, their liability is limited in amount to the sum of \$70. It is the meaning of this condition which constitutes the problem before the Court for solution.

Section 4(b) of the conditions contained in the bill of lading reads [see *supra*].

The learned trial judge presents the point for determination as follows:

"Do the words 'loss or damage' include theft by the defendant carrier's driver? The words 'loss or damage,' used in the exception are general words. Are they wide enough to relieve the carrier from liability for the theft of the goods by the carrier's employee?"

The contract or bill of lading, and the terms contained therein, are those authorized and required to be used by s. 12 of the regulations and schedule thereto made pursuant to the provisions of The Commercial Vehicles Act, R.S.O. 1937, c. 290.

In view of the fact that the statute makes compulsory the use of the bill of lading in question, the words of Viscount Haldane L.C. in *Grand Trunk Railway Company of Canada v. Robinson*, [1915] A.C. 740, 22 D.L.R. 1, 31 W.L.R. 241, 19 C.R.C. 37, would appear to be applicable. He said, at p. 747:

"If the law authorizes it, such a contract cannot be pronounced to be unreasonable by a Court of justice. The specific

contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him."

The judgment of Wright J. in *Shaw v. The Great Western Railway Company*, [1894] 1 Q.B. 373, is of assistance in determining the issue in this appeal. There the plaintiff delivered certain goods to the defendant railway company as a common carrier. The plaintiff signed a consignment note containing the following condition:

"The Great Western Railway Company give public notice that they hold themselves entirely relieved from loss of or damage done to all goods, matters, or things described in the Act of Wm. 4, c. 68, unless the particular articles be declared, and an assurance over and above the carriage be paid as compensation for the risk incurred."

The plaintiff did not declare the goods or pay any increase of charge in respect of them. The goods were stolen in transit by a servant of the defendant railway company, without negligence on the part of the company, and the question before the Court was whether the defendants were liable for the loss. It was held that the defendants were not liable. Wright J., in delivering the judgment of the Court, said that it was clear law that a common carrier by land is, in the absence of exemption by statute, contract, or fraud, liable for loss by theft whether by strangers or by his own servants.

After considering the provisions of The Carriers Act, 1830 and The Railway and Canal Traffic Act, 1854, Wright J. further said, at p. 383:

"The company, therefore, as regards theft without negligence, are left in the same position in which they had been at common law for at least a hundred years in relation to such theft, and that is—that, subject in the case of the valuables specified in the Act of 1830 to the provisions of s. 8 of that Act, they can, by contract or notice 'brought home,' exempt themselves from liability for such theft."

The terms of the contract in that case are materially similar to those of condition 4(b) of the bill of lading in the appeal now under consideration.

There are several cases in our own courts in which the interpretation of bills of lading dealing with the liability of a car-

rier for loss or damage is discussed, such as *Robertson v. The Grand Trunk Railway Company of Canada* (1895), 24 S.C.R. 611; *St. Mary's Creamery Co. v. Grand Trunk Railway Co.* (1904), 8 O.L.R. 1, 3 C.R.C. 447, and *Sutherland v. The Grand Trunk Railway Company* (1909), 18 O.L.R. 139, 8 C.R.C. 389, the decisions in which all depend upon the several special statutes governing the respective contracts. The distinction made between a contract for exemption from all liability and one fixing or limiting the amount of damages beyond which no claim could be made or recovered in any case whatever, is not of moment in the present case. The bill of lading under consideration allows the loss to be limited, and the sole question requiring consideration, as I see it, is that propounded by the learned trial judge, whose words I have already set out.

In his reasons for judgment, Barlow J. placed stress upon the decision of the Court of Appeal in England in *Steinman & Co. v. Angier Line, Limited*, [1891] 1 Q.B. 619. This is a case which deals with maritime law and custom, and there are discussed the several classes of theft as they relate to insurance policies against marine casualties, such as "outside thefts" as contrasted with those which "belong to the ship". It was held that the words in the bill of lading, "thieves of whatever kind, whether on board or not, or by land or sea" were words of general exemption, and only intended to relieve the carrier from liability where there had been no misconduct or default on his part, or that of his servants. Bowen L.J., at p. 623, said:

" . . . that words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants." The bill of lading in this case contained an exemption clause by which the defendants were not to be liable for loss caused by, *inter alia*, "pirates, robbers, or thieves of whatever kind, whether on board or not, or by land or sea."

One of the basic rules of construction, in an endeavour to find the true intent and meaning of a contract, is that, in general, all contracts must be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement: *Browning et al. v. Masson, Limited* (1915), 52 S.C.R. 379, 27 D.L.R. 360.

As has been said, the bill of lading is in the form prescribed and authorized for use by The Commercial Vehicles Act. The common law rights of the subject are not to be taken away or affected by statute, except only to such extent as may be necessary to give effect to the intention of Parliament when clearly expressed, or when such must follow by necessary implication, and if the rights of persons are encroached upon, this intention must be made manifest by the language of the statute, if not by express words, then by clear implication and beyond reasonable doubt.

I am unable to conclude that the words "loss or damage" in s. 4(b) of the conditions of the bill of lading are ambiguous. I think that these words in this contract are to be considered as falling within the exception mentioned by Bowen L.J. in the *Steinman* case, *supra*, being words that are clear and precise in their meaning, and that this fact is confirmed when they are read in their context with the rest of the language of the condition, and that, moreover, the liability at common law of a common carrier for loss by theft is not taken away to any greater extent than is manifest by the express words of the bill of lading. An intention to do more is not shown by the contract, the terms of which are required to be used by, and have the force of, the statute.

I am, therefore, of the opinion that the words "loss or damage", as found in said s. 4(b), do include loss caused by the theft of the employee of the appellant company, and that, therefore, the appellants are relieved from liability except to the extent of \$40 per hundred pounds, or in all, the sum of \$70, which has been paid into court. I think the appeal should be allowed and the judgment at the trial be set aside. Judgment should be entered for the plaintiffs for \$70. The appellants, with payment into court, plead tender, before action, of the sum so paid in, and such being the case, as the respondents have not succeeded in recovering more than the amount paid in, the appellants are entitled to the whole costs of the action and the appeal: *The American Aristotype Co. v. Eakins* (1904), 7 O.L.R. 127.

Appeal allowed with costs throughout.

Solicitors for the plaintiffs, respondents: Luxenberg, Levintter, Ciglen & Grossberg, Toronto.

Solicitor for the defendants, appellants: David J. Walker, Toronto.

[COURT OF APPEAL.]

Rex v. Mazerall.

Evidence—Admissibility of Evidence Given on Oath before Royal Commission—Inapplicability of Rules respecting Confessions to Police or Persons in Authority—Criminating Answers—Failure to Object—The Canada Evidence Act, R.S.C. 1927, c. 59, s. 5—Proof of Appointment of Commission.

Where the prosecution seeks to give in evidence against an accused upon his trial evidence given by him in other proceedings on oath duly administered by a body or person having authority, and it is proved that the accused, when examined, did not object to answer questions on the ground that the answers might tend to criminate him, the evidence is admissible without proof that it was "voluntary" in the sense that it was not induced by any promise or threat. The rules governing the admissibility of confessions are wholly inapplicable to the admission of such evidence, and there is no necessity for the trial of an issue by the judge as to its admissibility. *Rex v. Merceron* (1818), 2 Stark. 366; *Rex v. Haworth* (1830), 4 C. & P. 254; *Reg. v. Scott* (1856), Dears. & B. 47; *Reg. v. Coote* (1873), L.R. 4 P.C. 599, discussed; *Re Ginsberg* (1917), 40 O.L.R. 136; *Rex v. Barnes* (1921), 49 O.L.R. 374; *Rex v. Tass* (1946), 54 Man. R. 1, referred to.

Where the evidence so tendered has been given before a Royal Commission, and the Crown proves the Order in Council, made under proper statutory authority, for the constitution of the Commission, and that the persons named as Commissioners have proceeded to act as such, and were so acting when the evidence tendered was taken, there is sufficient proof of the authority of the Commissioners, without production of the actual instrument of appointment. The maxim *omnia praesumuntur rite esse acta* applies.

Conspiracy—To Commit Indictable Offences—Breaches of The Official Secrets Act, 1939 (Dom.), c. 49—Obtaining Information for Communication to Foreign Power—Purposes Prejudicial to Safety or Interests of the State—Sufficiency of Evidence.

On appeal from a conviction for conspiracy with others to commit an offence under The Official Secrets Act, viz., for purposes prejudicial to the safety or interests of the State to obtain or communicate to another person or persons documents or information which were calculated to be or might be or were intended to be directly or indirectly useful to a foreign power, held, the evidence, summarized in part in the reasons for judgment, was sufficient to support the verdict. It was true that the appellant had not taken an active part in all the activities of the conspirators, but there was ample evidence that he knew that the purpose, in the carrying out of which he was to take a part, was to supply, for communication to a foreign power, information, to be furnished by servants of the Government of Canada, of secret matters of the character charged in the indictment. The jury might reasonably infer, from different matters of evidence, that the appellant well knew of the existence of a conspiracy that went beyond his own part in it, and that it was of an unlawful character, as charged. *Rex v. Meyrick*; *Rex v. Ribuffi* (1929), 21 Cr. App. R. 94, referred to. Nor was it conclusive, in the circumstances, since it was proved that the appellant had agreed to supply information, as requested, that the only information actually supplied was not of a highly secret or confidential nature, since it was not unreasonable to assume that it would be useful to the foreign power in question to know what research activities were being carried on, and to have members of Canada's own research staff secretly keeping another Government informed of their work and its results was prejudicial to the interests of Canada as an independent State.

AN APPEAL by the accused from his conviction before McRuer C.J.H.C. and a jury. The judgment of McRuer C.J.H.C. as to the admissibility of certain evidence is reported *ante*, p. 511, 86 C.C.C. 137, 2 C.R. 1.

9th to 12th September 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

G. A. Martin, K.C. (Roydon A. Hughes, K.C., with him), for the accused, appellant: The evidence of the accused before the Royal Commission should not have been admitted as evidence against him on this trial. The trial judge confused the rules respecting a witness's privilege against self-incrimination with those respecting confessions.

The trial judge's ruling that the body of law relating to the admissibility of confessions has no application to evidence given on oath, since the latter must be presumed to be true, is not supported by authority, and is directly contrary to the views expressed in Russell on Crimes, 8th ed. 1923, vol. 2, p. 2031; Wigmore on Evidence, 3rd ed. 1940, vol. 8, p. 387, s. 2266; Phipson on Evidence, 8th ed. 1942, p. 253. [ROBERTSON C.J.O.: Is there any case where a confession made on oath was excluded as not "voluntary" within the cases?] There is one referred to in Phipson, where an affidavit or sworn information was rejected on that ground.

There had clearly been an inducement by Inspector Harvison before the accused made a statement to him, which in turn was before he gave his evidence before the Royal Commission. [ROBERTSON C.J.O.: How can an inducement be material when the accused, in his evidence on the trial within the trial, swore that his evidence before the Commission was the truth?] The truth or falsity of a confession is not the criterion of its admissibility, although the rule is no doubt based upon the probability that a confession obtained by an inducement will not be true. The fundamental rule is that a confession so obtained is inadmissible. [ROBERTSON C.J.O.: But the effect of the accused's later evidence is that he was not influenced by any inducement, but told the truth before the Commission.] The rule is absolute that a confession obtained by improper means is inadmissible, and the Court will not inquire, when it is tendered in evidence, whether it is true or false. Neither the trial judge nor Crown counsel at the trial considered that the accused's later admission

was conclusive. [ROBERTSON C.J.O.: What I am pointing out is that the conversation with the police officer took place days before this evidence was given, and that the accused says that when he gave the evidence he told the truth.] There was no express finding by the trial judge that the evidence was not "induced", because he held that the rules as to inducements were inapplicable, and our submission is that such a finding was essential before the evidence could be admitted: *Reg. v. Croydon et al.* (1846), 2 Cox C.C. 67; *Reg. v. Thompson*, [1893] 2 Q.B. 12.

The accused, shortly after Inspector Harvison's statement that the Commission might take a lenient view if he "made a clean breast of it", made a statement to the inspector, and that statement was made part of the brief of Commission counsel, and the examination of accused before the Commission may have been much more complete than it would have been if there had been no such statement. The hope of leniency, induced by the inspector's remarks, may well have brought about a ready agreement by the accused with leading questions asked by Commission counsel. The accused, in his evidence on the trial within the trial, qualified his admission that the evidence was true.

If a confession has been improperly obtained, it will be excluded, even if it is clearly proved to have been true: *Rex v. Hammond* (1941), 28 Cr. App. R. 84; *Reg. v. O'Keefe* (1893), 14 N.S.W.L.R. 343. The very case relied on by the Crown here, and by the trial judge, *Walker v. The King*, [1939] S.C.R. 214, 71 C.C.C. 305, [1939] 2 D.L.R. 353, merely states that compulsion *alone* does not render a statement inadmissible, thus clearly implying that other circumstances may make inadmissible a statement given under the compulsion of a statute. See also *Rex v. Steinson*, [1945] 3 W.W.R. 438, 85 C.C.C. 200 at 205, [1946] 1 D.L.R. 543.

Inspector Harvison's words are clearly an inducement within the authorities, and the inducing effect of such a statement need not be sworn to, but is presumed: *Gach v. The King*, [1943] S.C.R. 250, 79 C.C.C. 221, [1943] 2 D.L.R. 417. This being so, the effect of the inducement must be shown to have been removed before the confession can be admitted in evidence: Tremear's Criminal Code, 5th ed. 1944, p. 760; Phipson, *op. cit.*, p. 258; *Rex v. Kong* (1914), 20 B.C.R. 71, 24 C.C.C. 142; *Rex v.*

Myles, 56 N.S.R. 18, 40 C.C.C. 84, [1923] 2 D.L.R. 880; *Rex v. Hammond*, *supra*, shows clearly that the truth of a confession is not decisive as to its admissibility as "voluntary". We refer to the discussion of this case in *Rex v. Weighill*, 61 B.C.R. 140, 83 C.C.C. 387, [1945] 1 W.W.R. 561, [1945] 2 D.L.R. 471. [ROBERTSON C.J.O.: That is hardly my point. My question was rather whether the accused's statement at the trial that he had told the truth before the Commission did not show clearly that no inducement had been operating at that time.]

Reg. v. Coote (1873), L.R. 4 P.C. 599, C.R. [6] A.C. 282, and *Reg. v. Scott* (1856), Dears. & B. 47, 169 E.R. 909, 7 Cox C.C. 164, relied on by the trial judge, are both cases where the previous statement on oath was not preceded by any promise or inducement. They deal only with the privilege against self-incrimination, and have nothing to do with the special rules as to confessions.

In the particular circumstances of this case, the line of cases holding that a witness is presumed to know the law and must object to answer questions before having the protection of s. 5 of The Canada Evidence Act, R.S.C. 1927, c. 59, should not be applied. Here the accused had not the benefit of counsel's advice, and did not voluntarily waive any privilege. He may even have been led to waive it (if his conduct is held to amount to a waiver) by Inspector Harvison's inducement. *Rex v. Tass*, 54 Man. R. 1, 86 C.C.C. 97, 1 C.R. 378, [1946] 2 W.W.R. 97, [1946] 3 D.L.R. 804, is distinguishable on its facts from the case at bar, in several respects, particularly in that there was there no question of an inducement. The dissenting judgment of Dysart J., at p. 128 (C.C.C.), is, in our submission, a correct statement of the law. See also *Reg. v. Coldwell and Ryder* (1863), 2 W. & W. 208 at 210.

There was no proper evidence of the appointment of the Royal Commissioners. The Order in Council, P.C. 411/1946, does not appoint anyone, and is not itself a "commission" within the meaning of The Inquiries Act, R.S.C. 1927, c. 99, and there is therefore no evidence that the Commissioners had legal authority to take evidence on oath. [ROBERTSON C.J.O.: We know that the persons named in P.C. 411 sat as commissioners, and is there not a presumption, in such circumstances, that everything was validly done?] Not where the Crown produces an Order in Council, which in fact does not appoint a Commission.

[ROBERTSON C.J.O.: The Order in Council gives power to issue a commission, and surely we must presume that one was in fact issued.]

The essence of an offence under s. 3 of The Official Secrets Act, 1939 (Dom.), c. 49, is an intent or purpose prejudicial to the safety or interests of the State. This is not required under s. 4, but the charge here is one of conspiracy to violate s. 3. The indictment is defective in that it does not allege that the information to be collected, etc., was secret. The accused's evidence before the Commission negatives any such intent or purpose. According to this and other evidence, both the reports that he gave to Lunan were marked "confidential" only, and were given to Russian representatives at a conference in London within a few days after he gave them to Lunan, and were published in the following month. The evidence of the accused's superior officer is that if the accused had asked for permission to disclose this information to the Russians it would probably have been granted, and that the same type of information was actually being given to them from month to month.

To establish a conspiracy, a real agreement, or meeting of minds, must be shown. The evidence here is capable of supporting an inference that the accused, who says he gave only innocuous documents, never intended to give Lunan secret or important documents, and that he agreed only outwardly to Lunan's proposition. The charge, and the essence of the offence, is that the agreement was made for a purpose prejudicial to the State, and such an inference as this would negative such a purpose. This possible view of the evidence was never submitted to the jury by the trial judge. [ROBERTSON C.J.O.: Are you not attaching too much importance to these particular documents? The agreement between the accused and Lunan was far wider, and he agreed to be a part, even if only an insignificant part, of the general scheme.] The accused's own state of mind and intention is all-important in deciding what he actually agreed to do. [ROBERTSON C.J.O.: The jury are not required to believe his evidence on that point.] No, but they should have been given an opportunity to consider it. The trial judge's definition of the offence alleged in the indictment was wholly inadequate. He passed very lightly over the words referring to the purpose prejudicial to the safety or interests of the State, emphasizing the word "interests" only, and thus left the jury to think that

the accused's state of mind was not important. In reading from the accused's evidence to the jury, he omitted passages in which the accused said that he did not know the documents were marked "confidential", and thus withdrew these passages from their consideration.

Subs. 2 of s. 3 of The Official Secrets Act provides for a presumption, in certain circumstances, of a purpose prejudicial to the safety or interests of the State, but this subsection applies only "on a prosecution under this section", and cannot be invoked here, where the indictment was for conspiracy, under s. 573 of The Criminal Code, R.S.C. 1927, c. 36.

As to the effect of the trial judge's failure to draw this favourable evidence to the jury's attention, we rely on *Rex v. Hughes*, 57 B.C.R. 521, [1942] 3 W.W.R. 1, 78 C.C.C. 1 at 15-6, [1942] 3 D.L.R. 391, affirmed [1942] S.C.R. 517, 78 C.C.C. 257, [1943] 1 D.L.R. 1; *Rex v. Findlay*, 60 B.C.R. 481, 81 C.C.C. 183, [1944] 1 W.W.R. 609, [1944] 2 D.L.R. 773; *Brooks v. The King*, [1927] S.C.R. 633, 48 C.C.C. 333, [1928] 1 D.L.R. 268; *Markadonis v. The King*, [1935] S.C.R. 657 at 662, 64 C.C.C. 41, [1935] 3 D.L.R. 424; *Rex v. Harms*, [1936] 2 W.W.R. 114, 66 C.C.C. 134 at 141, [1936] 3 D.L.R. 497.

The essential question was whether there had ever been a real meeting of minds, and this was never put before the jury, nor was their attention drawn to evidence upon which they could have found that there was no such agreement: 15 Corpus Juris Secundum, 1939, p. 1061, s. 38 and note 29.

Lunan's reports to his superiors as to what the accused had done were not evidence against the accused of the truth of the statements therein, and should not have been admitted at the trial: Taylor on Evidence, 12th ed. 1931, vol. 1, p. 377.

Reverting to our first argument, there is no presumption of law against the commission of perjury, and this is therefore not a case of conflicting presumptions. The cases 100 years ago seem always to have excluded a statement of an accused before magistrates if it was made on oath, though not if it was unsworn. Part of the judgments in *Reg. v. Coote*, *supra*, and *Reg. v. Scott*, *supra*, is devoted to rejecting the idea that an oath rendered a statement inadmissible: see Russell, *op. cit.*, vol. 2, p. 2028.

Where an inducement is shown to have been held out, the Court will not enter upon an exhaustive inquiry to determine

whether or not it brought about the making of the statement: Wigmore, *op. cit.*, vol. 3, pp. 333-4.

The trial judge should not have told the jury that they might find corroboration of Gouzenko's evidence in the documents produced by him. Since the testimony of Gouzenko was required to authenticate the documents, they could not constitute *independent* evidence implicating the accused.

J. R. Cartwright, K.C. (Lee A. Kelley, K.C., with him), for the Crown, respondent: The documents were properly put in as exhibits on Gouzenko's evidence, and when other evidence shows that statements in the documents are undoubtedly true, and it is obvious that Gouzenko could not have made them up, they are properly available as corroboration of his evidence. The trial judge's charge to the jury as to corroboration was unexceptionable. If the accused's evidence before the Royal Commission was properly admitted, it corroborates Gouzenko so amply that no error in the charge on this point could possibly have resulted in a miscarriage of justice.

The indictment need not allege, nor need we prove, that the documents handed over by the accused were secret. It is plain from s. 3(1)(c) of The Official Secrets Act that the offence does not include that element, and that the word "secret" in the paragraph qualifies only the following words "official code word, or pass word"; this is clear upon an ordinary grammatical construction of the paragraph, and is made even clearer by a consideration of subs. 2 of s. 3, where the order is transposed. By analogy, we refer to *Rex v. Simington*, [1921] 1 K.B. 451; and *Rex v. Crisp and Homewood* (1919), 83 J.P. 121. There was no motion to quash the indictment on this ground.

We submit that the presumption under s. 3(2) does apply in this case: *Desrochers v. The King*, 69 C.C.C. 322 at 332, [1938] 3 D.L.R. 128. In any case, however, the trial judge said nothing to the jury about any presumption, and we need not rely upon it, since the prejudicial purpose is amply shown by the evidence. The prejudicial purpose must be shown to exist, not in connection with the agreement, but in connection with the collection and transmission of information. We are in no way concerned with the accused's state of mind in entering into the agreement. What matters is what he agreed to do. The questions to be answered are: Did the accused agree to collect and communicate information? For what purpose was that information to

be collected and communicated? Was that purpose prejudicial to the safety or interests of the State? The trial judge, in his charge, made it plain that this prejudicial purpose was an essential ingredient of the offence, and no objection was taken to his charge in this respect. It is abundantly plain that the accused agreed to collect and communicate information which he knew was to be transmitted to a foreign power through unauthorized channels. No properly directed jury could have failed to find, on the evidence, that he had agreed as charged. There is no basis in the evidence for the suggestion that he agreed in words only, without any intention of actually giving any information of value. The jury were entitled to draw an inference from his failure to report to the authorities, and also from his failure to go into the witness-box in his own defence at the trial: *Rex v. Baugh* (1917), 38 O.L.R. 559 at 565, 28 C.C.C. 146, 33 D.L.R. 191. Such an explanation was not even suggested by counsel at the trial.

The failure to prove the formal appointment of the Commissioners was not fatal. Since The Inquiries Act, R.S.C. 1927, c. 99, permits the Governor in Council to appoint commissioners, and there is before the Court a certified copy of an Order in Council recommending such an appointment, and it appears that the two persons named did in fact sit as commissioners, the maxim *omnia praesumuntur rite et solenniter esse acta donec probetur in contrarium* applies. As to the maxim, we refer to Broom's Legal Maxims, 10th ed. 1939, p. 642. The burden lay on the accused, if he challenged the validity of the appointment, to substantiate his challenge. In any case, the burden, if it lay on the Crown, was fully met. Sections 2 and 3 of The Inquiries Act, and the terms of P.C. 411/1946, make this quite clear. As to the words "commission in the case", as used in s. 3, we refer to Craies, Statute Law, 4th ed. 1936, p. 150; the Shorter Oxford Dictionary, 2nd ed. 1936, vol. 1, p. 349, s.v. "commission"; *Rex v. Dudman* (1825), 4 B. & C. 850 at 854, 107 E.R. 1275; *Mansell v. The Queen* (1857), 8 E. & B. 85 at 109, 120 E.R. 32. The word "commission" has no particular meaning, and is not defined in The Inquiries Act.

The evidence given by the accused before the Royal Commission was properly admitted as evidence against him at this trial. The body of law relating to confessions has nothing to do with evidence lawfully given on oath before a tribunal entitled

to receive it, which is admissible on quite different principles. The cases do not support the statements to the contrary in the text-books. *Reg. v. Gillis* (1866), 11 Cox C.C. 69, cited by Phipson, *loc. cit.*, is distinguishable on its facts, and in any case is not binding on this Court. In this, and every other case which appears to be contrary to the principle just stated, the witness was under no compulsion to give the evidence in question. *Reg. v. Cherry* (1871), 12 Cox C.C. 32 at 34, shows the distinction between evidence volunteered and evidence given under the compulsion of a statute. [ROBERTSON C.J.O.: Best on Evidence, 12th ed. 1922, pp. 472, 475, deals in separate sections with the admissibility of confessions and that of self-incriminating evidence.] Our submission is that that is the correct way to treat the matter. Wigmore, *loc. cit.*, in support of his dogmatic statements, refers back to vol. 3, pp. 298-311, ss. 848-50. There is no case cited in those sections to support the principle here contended for by the appellant. They rather support our submission: see particularly p. 308. Russell, *loc. cit.*, cites no case which can support the appellant's contention, and there is a statement in our support at p. 2032, which is borne out by *Reg. v. Goldshede and Sidney* (1844), 1 Car. & K. 656, 174 E.R. 979; *Reg. v. Sloggett* (1856), Dears. C.C. 656, 169 E.R. 885; *Reg. v. Scott* (1856), Dears. & B. 47, 169 E.R. 909; *Stockfleth v. De Tastet et al.* (1814), 4 Camp. 10, 171 E.R. 4.

The Australian cases cited by the appellant are not authorities against our contention, and in any case are not binding on this Court. *Reg. v. Coldwell and Ryder* (1863), 2 W. & W. 208, is based upon an Australian statute which is not available here, but would appear, from the judgments, to be quite different from anything in force in Canada. In *Reg. v. O'Keefe* (1893), 14 N.S.W.L.R. 345, a confession (not on oath) had been improperly admitted in evidence against the accused, and the Court refused to hold that there had been no substantial wrong or miscarriage merely because, after the improper admission of this confession, the accused had gone into the witness-box and admitted his guilt.

The question of an inducement may affect the weight of the evidence, but has nothing to do with its admissibility. The passage referred to in *Rex v. Steinson*, [1945] 3 W.W.R. 438, 85 C.C.C. 200 at 205, [1946] 1 D.L.R. 543, which is *obiter* only, is based on the fact that there are different ways in which a man may make a statement "under the compulsion" of a statute.

One way is as in the present case, where the statute requires him to give evidence on oath. Another is as in *Walker v. The King*, [1939] S.C.R. 214, 71 C.C.C. 305, [1939] 2 D.L.R. 353, where information must be given, but not on oath. The words "for that reason alone" in the *Walker* case may mean that an accused may rely upon the presence of an inducement or threat in the case of such a statement as was there required.

There was no duty on the trial judge to determine whether or not there had been an inducement. *Reg. v. Croydon* (1846), 2 Cox C.C. 67, and *Reg. v. Thompson*, [1893] 2 Q.B. 12, do not support the argument that there was such a duty; in neither of them was it a question of the admissibility of evidence given on oath. It is irrelevant, for the same reason, whether or not Inspector Harvison was a person in authority.

There is nothing in any of the cases to shake the authority of the decisions relied on by the trial judge in this connection. We refer also to *Rex v. Tass*, 54 Man. R. 1, 86 C.C.C. 97, 1 C.R. 378, [1946] 2 W.W.R. 97, [1946] 3 D.L.R. 804, particularly the judgment of Bergman J.A. at pp. 104, 108, 109, 115 (C.C.C.).

If, as argued, the accused failed to object to answer questions (as required for the protection of s. 5 of The Canada Evidence Act, R.S.C. 1927, c. 59) because of the inducement previously held out by Harvison, surely he would have said so at the trial within a trial. He said nothing of the sort, but rather that Harvison's remarks induced him to speak truly, and to reject his first idea, which was to deny everything.

The appellant's argument that the evidence does not disclose a purpose prejudicial to the safety or interests of the State cannot be supported. The whole evidence in the case must be considered in this connection, and that evidence makes it clear that the purpose of the obtaining and communicating of information was highly prejudicial.

The statements in the documents are properly admissible as evidence against the accused, because he has admitted his agreement with Lunan, and these statements by Lunan and others were clearly made in furtherance of the common object: *Reg. v. Connolly and McGreevy* (1894), 25 O.R. 151, 1 C.C.C. 468; *Rex v. Wilson* (1911), 4 Alta. L.R. 35, 21 C.C.C. 105, 1 W.W.R. 272, 19 W.L.R. 657; *Rex v. Hardy* (1794), 24 State Tri. 199 at 447; 31 Corpus Juris Secundum, 1942, s. 362.

It is not misdirection for the trial judge to fail to put to the jury a "theory of the defence" which has not been put forward at the trial, but has been evolved subsequently, on a careful consideration of the record. It was never suggested at the trial that the accused had not really agreed with Lunan. It has repeatedly been laid down that the agreement often cannot be directly proved, but must be inferred from the overt acts. What the trial judge told the jury about the theory of the defence was proper and consistent with the case presented at the trial, and was sufficient within the authorities. He was not required to go, point by point, over every submission made in the trial.

If there was any error on the part of the trial judge, apart from the admission of the evidence given before the Royal Commission, that evidence makes the accused's guilt so abundantly plain that the appeal should be dismissed despite such error, under s. 1014(2) of the Code: *Rex v. Haddy*, [1944] K.B. 442, [1944] 1 All E.R. 319, 29 Cr. App. R. 182; *Stirland v. Director of Public Prosecutions*, [1944] A.C. 315, [1944] 2 All E.R. 13, 30 Cr. App. R. 40.

G. A. Martin, K.C., in reply: It is obvious that a prosecution for conspiracy cannot be a prosecution "under" The Official Secrets Act, since the accused, if subsequently indicted under the Act, could not plead *autrefois acquit* or *autrefois convict*: *Rex v. Brown*, [1945] O.R. 869, 85 C.C.C. 91, [1946] 1 D.L.R. 741.

No authority, except possibly *Reg. v. Cherry, supra*, has been cited to show that evidence on oath is admissible notwithstanding a previous inducement or threat. [ROBERTSON C.J.O.: Where the rules respecting confessions are applicable, the Crown is required to prove affirmatively that the statement in question was "voluntary". Apparently it was not called upon in any of the cases to show that there had been no inducement, and does that not indicate that the rules as to inducements were not considered applicable?] The matter does not appear to have arisen at all. The cases holding that the burden is on the Crown appear to date from *Reg. v. Thompson, supra*, in 1893, whereas both *Reg. v. Scott, supra*, and *Reg. v. Coote, supra*, were decided before that date. These two cases, relied on both by the trial judge here and by the Supreme Court in *Walker v. The King, supra*, must be considered in the light of the law as it existed

when they were decided, under which an accused person could ordinarily not be sworn in his own case at all. *Reg. v. Cherry, supra*, is a *nisi prius* judgment, and what was said to the accused there was not an "inducement" within the meaning of the rules relating to confessions.

The accused's obligation in this case was the same as that on any witness on whom a *subpoena* is served—to attend, and to answer such questions as were put to him. Commission counsel's questions here were no doubt formulated very largely from the statement taken from the accused by the police, and may have been much more thorough and searching than they would have been if there had been no such statement. The inducement which brought about the original statement therefore probably caused the accused to go beyond what would otherwise have been his legal obligation.

While the trial judge was not bound to read all of the evidence to the jury, he was not entitled to read only some of it, omitting those parts on which the defence relied, and then tell the jury that he had "dealt with" or "covered" all of it.

There is no evidence that the accused knew the extent of the conspiracy, as set out in the particulars. If we are limited to the particular conspiracy set out in the indictment, at least half the documents put in at the trial were inadmissible. [ROBERTSON C.J.O.: Surely the cases are to the effect that if a man knowingly enters a conspiracy he is responsible for the whole of that conspiracy, even if he does not know all the details.] Only within the common purpose to which he agreed.

Many of the documents were not admissible at all—*e.g.*, the diary of Col. Zabotin. A mere personal narrative cannot be an act or declaration in furtherance of the common purpose: Phipson, *op. cit.*, p. 93; *Rex v. Wark* (1898), 33 L. Jo. 615.

As to substantial wrong or miscarriage of justice, we refer to *Maxwell v. Director of Public Prosecutions*, [1935] A.C. 309 at 323, 24 Cr. App. R. 152.

Cur. adv. vult.

16th October 1946. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—The appellant appeals from his conviction by McRuer C.J.H.C. and a jury, at Ottawa, on the 22nd May 1946, on a charge that he, during the year 1945, at the city of

Ottawa, in the county of Carleton, and elsewhere in the Province of Ontario, and in the Province of Quebec "did unlawfully conspire together and with Lieutenant-Colonel Vassili M. Rogov, Colonel Nicolai Zabotin, David Graham Lunan and Israel Halperin, one with another or others of them, and with other persons unknown, to commit an indictable offence, to wit, a breach of Section 3, Subsection (1)(c) of The Official Secrets Act, being Chapter 49 of the Statutes of Canada, 1939, 3 George VI, that is to say for purposes prejudicial to the safety or interests of the State to obtain, collect, record, publish or communicate to another person or persons documents or information which were calculated to be or might be or were intended to be directly or indirectly useful to a foreign power, to wit, the Union of Soviet Socialist Republics, contrary to Section 575 of The Criminal Code, in such case made and provided."

The appellant is a graduate of the University of New Brunswick in electrical engineering, and is a member of the American Institute of Electrical Engineers. He was born at Fredericton, in the Province of New Brunswick, in the year 1916, and is a married man. He was employed with the Canadian Broadcasting Corporation in Ottawa from 1939 until January 1942. On the 13th January 1942 he entered the service of the National Research Council at Ottawa, where he became an engineer in the Radio Research and Development Section, until some time in the year 1944. He then became an engineer in the Air Force Section of the Radio Branch of the National Research Council, where he was employed at the time of the matters with which this prosecution was concerned. The National Research Council is a branch of the Government of the Dominion of Canada, and the appellant was required, upon his engagement, to take the oath of allegiance, an oath of office and an oath of secrecy.

The Official Secrets Act, 1939 (Dom.), c. 49, provides in s. 3(1)(c) as follows:

"(1) If any person for any purpose prejudicial to the safety or interests of the State,

"(c) obtains, collects, records, or publishes, or communicates to any other person any secret official code word, or pass word, or any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power; he shall be guilty of an offence under this Act."

Section 14 of The Official Secrets Act applies to such an offence. It provides that where no specific penalty is provided in the Act, any person who is guilty of an offence under the Act shall be deemed to be guilty of an indictable offence.

The charge of conspiracy on which the appellant was tried was laid under s. 573 of The Criminal Code, R.S.C. 1927, c. 36, which is as follows:

“Every one is guilty of an indictable offence and liable to seven years’ imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.”

Certain events occurred that preceded the laying of the charge of conspiracy against the appellant, and I should state them here.

On the 15th February 1946, the appellant was taken into custody by an officer of the Royal Canadian Mounted Police, and was detained in custody in the police barracks in Ottawa under the authority of an Order in Council of the 6th October 1945, purporting to be made under powers conferred upon the Governor General in Council by The War Measures Act, R.S.C. 1927, c. 206. By this Order in Council the Acting Prime Minister or the Minister of Justice, if satisfied that, with a view to preventing any particular person from communicating secret and confidential information to an agent of a foreign power, or otherwise acting in any manner prejudicial to the public safety or the safety of the State, it was necessary so to do, was authorized to make an order that any such person be interrogated and/or detained in such place and under such conditions as he might from time to time determine. Clause 2 of the Order in Council provided that any person shall, while detained by virtue of an order made under the Order in Council, be deemed to be in legal custody.

While still in the custody of the Royal Canadian Mounted Police, under the authority aforesaid, no charge having as yet been laid against him, the appellant, on the 27th February 1946, was brought before a Royal Commission, the members of which were The Honourable Robert Taschereau and The Honourable R. L. Kellock, both judges of the Supreme Court of Canada. This Royal Commission was appointed by Order in Council of 5th February 1946, made under The Inquiries Act, R.S.C. 1927, c. 99, with authority “to inquire into and report upon which public officials and other persons in positions of trust or other-

wise have communicated, directly or indirectly, secret and confidential information, the disclosure of which might be inimical to the safety and interests of Canada, to the agents of a Foreign Power and the facts relating to and circumstances surrounding such communication”.

The Commissioners were expressly empowered to summon before them any person or witness, and to require them to give evidence on oath or affirmation, orally or in writing, and to require them to produce such documents and things as the Commissioners deemed requisite to the full investigation of matters into which they were appointed to examine. Exercising this power, the Commissioners administered an oath to the appellant, and he was examined by counsel for the Commissioners and by the Commissioners themselves. The appellant was not represented by counsel before the Commissioners, and it does not appear that he expressed any desire to have counsel. The questions put to him, and his answers thereto, were taken down in shorthand, and extracts from a transcript of this evidence, proved by the shorthand reporters who took it down, were put in as evidence by the prosecution on the trial of the appellant.

This evidence of the appellant taken before the Commissioners formed an important, and indeed an essential, part of the case against him on his trial, and its admissibility in evidence against him was strongly contested at the trial, and again upon argument of the appeal.

It is this evidence of the appellant upon which the Crown mainly relied to connect him with a conspiracy, the existence of which, according to the contention of the Crown, had been proved by the evidence of other witnesses introduced earlier in the trial. The appellant's evidence is also of importance upon the question of the purposes and scope of the conspiracy, although it is not the only evidence of these matters. The evidence can hardly be called a confession by the appellant that he had committed any criminal offence, and, as already stated, the appellant had not been charged with any criminal offence at the time of his examination before the Royal Commission. There are, however, admissions by him in his evidence that, beyond question, may be said to tend to criminate him. The answers made by him upon his examination were made without objection by him.

Counsel for the Crown relied upon s. 5 of The Canada Evidence Act, R.S.C. 1927, c. 59, which is as follows:

"No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

"2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

This provision of The Canada Evidence Act is, by s. 2 of the Act, made to "apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf".

The admissibility of the evidence was contested upon several grounds:

It was contended that the Crown must first show that the Royal Commission was legally appointed, and that its proceedings were legal and strictly within the authority given it. It was contended that the Crown must first show that the statements made in evidence by the appellant were made voluntarily, in the sense that there was "an absence of fear of prejudice or hope of advantage held out by persons in authority". A third ground of objection was that the Royal Commission, even if shown to be properly constituted, had, by its conduct, lost jurisdiction to examine the appellant under oath.

It is, in my opinion, only the second of these objections that calls for any extended comment. With respect to the first objection, there is this to say, that the Crown did in fact prove in a proper way the Order in Council for the constitution of the Royal Commission, and that the persons named as Commissioners proceeded to act as such, and were so acting when the evidence objected to was taken. It seems to be clearly a case for the application of the maxim *omnia praesumuntur rite esse acta*: see Taylor on Evidence, 12th ed. 1931, pp. 135 and 155.

As to the third of the objections, what I take to be relied upon in support of it is the fact of the appellant's detention for a period before his evidence was taken; that he was brought before the Commissioners, not by the process of a *subpoena*, but in charge of the police who had detained him in custody; and that he did not have the assistance or advice of counsel. Whatever value these grounds of objection might have in considering the weight that ought to be given to the appellant's evidence taken before the Commissioners, I am quite unable to see how they could affect their right to examine him. The detention of the appellant in custody was not by the authority of the Commissioners, nor had they authority to release him. In examining the appellant on oath they were simply carrying out the purpose of their appointment. The retaining of counsel for the appellant was entirely a matter for him.

I deal then with the second objection. The ground upon which a confession, or the admission by an accused person of a fact that may tend to criminate him, is admitted in evidence against him, is that it may be presumed that he will not admit anything against his own interest, and which may be assumed reasonably to be within his knowledge, unless it be true. If, however, such confession or admission is made after a charge has been made, even informally, against the accused, to, or in the presence of, a person in authority, such as, for example, a constable who has the accused in custody, or the prosecutor, or the accused person's master, if the offence has been committed against the master's person or property, then the burden is cast upon the prosecution of establishing that the confession, or admission, is voluntary, in the sense that it was not induced by any threat or by any promise or inducement. Until the Crown has established that the confession, or admission, made in these circumstances was voluntary, in the sense stated, the confession, or admission, is not admissible in evidence. The principle upon which this rule is founded is not that there is any *prima facie* presumption that the statement is untrue, but rather that the accused may have been influenced to say what is untrue, and, it being uncertain whether the statement is true, it would be unsafe to receive a statement made under any influence or fear.

The rule is of long standing. Sir Matthew Hale (who died in 1676) in his "Pleas of the Crown", vol. II, p. 284, in dealing with the reception in evidence of confessions by the prisoner upon his

examination by a justice of the peace, taken without oath, says, "As to the examination of the prisoner it must be testified, that he did it freely without any menace, or undue terror imposed upon him . . ." More than a century later there is the case of *Rex v. Warwickshall* (1783), 1 Leach 263, 168 E.R. 234, where it was said, ". . . a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected." See also *Reg. v. Thompson*, [1893] 2 Q.B. 12 and *Ibrahim v. The King*, [1914] A.C. 599 at 609-614. I have made the older of these references in support of a well-established rule because in the course of the argument counsel for the appellant, in commenting upon an observation from the Court that the rule would not seem ever to have been applied in the case of admissions made in the course of evidence properly taken under oath, suggested that the rule requiring it to be first established that the statement was voluntary is of fairly recent origin. The rule is in fact a long-standing rule of the common law.

Notwithstanding that the rule is an ancient one that casts a burden upon the Crown to establish that a confession or an incriminating admission, made to one in authority, was voluntary in the understood sense, counsel for the appellant was unable to cite any case where any such proof was required from the Crown before admitting in evidence statements of the accused made in the course of his examination on oath before one duly authorized so to take the examination. There are many reported cases where such evidence has been admitted, but in none of them that I have found, or to which we were referred, was it required of the Crown that first it must be established that the statement was voluntary. These reported cases go back a long way. In *Rex v. Merceron* (1818), 2 Stark. 366, 171 E.R. 675, on the trial of an indictment against a magistrate for misconduct in his office, the evidence of the accused given before a committee of the House of Commons was admitted against an objection that the statements had been made under compulsory process from the House of Commons, and were not voluntary. In *Rex v. Haworth*, (1830), 4 C. & P. 254, 172 E.R. 693, evidence given by a witness on the trial of another for forgery was admitted against him on his own subsequent trial for forgery. In *Reg. v. Scott* (1856), Dears. & B. 47, 169 E.R. 909, 7 Cox C.C. 164, the evidence given

by a bankrupt on his examination in the Court of Bankruptcy was admitted against him on his trial upon a criminal charge. In *Reg. v. Coote* (1873), L.R. 4 C.P. 599, C.R. [6] A.C. 282, the depositions of a witness taken before fire commissioners investigating, under a statute of the Province of Quebec, the origin of fires, were held admissible as evidence against him when subsequently indicted for felony.

In none of the cases I have cited—and there are a number of similar cases—does it appear that the Crown was required, before the statements made by the accused on oath were admitted in evidence, to establish that there had been no promise or threat that induced them. The statements were admitted upon proof that the accused had made them on oath duly administered. No distinction seems to be made between statements made in a judicial proceeding and statements made upon an inquiry similar in character to that conducted before the Royal Commission here. I refer also on that point to *Re Ginsberg* (1917), 40 O.L.R. 136, 38 D.L.R. 261, and *Rex v. Barnes* (1921), 49 O.L.R. 374, 36 C.C.C. 40, 61 D.L.R. 623. I should also cite the recent decision of the Court of Appeal of the Province of Manitoba in *Rex v. Tass*, 54 Man. R. 1, 86 C.C.C. 97, 1 C.R. 378, [1946] 2 W.W.R. 97, [1946] 3 D.L.R. 804, which I have had the advantage of reading during the consideration of this appeal.

A limited privilege was allowed a witness who objected to answer when, under examination on oath, a question was put to him and an answer might tend to expose him to any criminal charge, or to a penalty or forfeiture. The objection must, however, be that of the witness, and the judge must determine, when the objection was taken, whether, in the circumstances of the case, the objection was reasonably well-founded. The maxim *nemo tenetur seipsum accusare* was applied, subject to these limitations. It is important also to note that the maxim applies to the time when the question is put, not to the use sought to be made of the answer, when the answer has been given: *Rex v. Scott*, *supra*, per Lord Campbell at p. 59 (Dears. & B.).

In Wigmore on Evidence, 3rd ed. 1940, Vol. 8, s. 2266, the distinction is clearly pointed out between the rule excluding a confession that may be untrustworthy because of the existence of some promise or threat that may have influenced the making of it, and the privilege allowed a witness against making answers that may tend to criminate him. The effect of s. 5 of The Canada

Evidence Act, which I have already quoted, is to make an even more obvious distinction. The witness, under the statute, must answer when examined on oath, whether the answer tends to criminate him or whether it does not, and whether he objects or does not object. His privilege now is, as defined by the statute, by objecting to prevent the use of his answer against him in other proceedings.

The appellant made no objection to answering the questions put to him on his examination before the Royal Commission, and, in my opinion, that circumstance determines the question of the admissibility of his statements then made when tendered in evidence against him upon his trial. If I am right in this opinion, then there was no occasion for hearing witnesses on the *voir dire* to enable the trial judge to determine the admissibility of the evidence tendered. That question of admissibility was to be determined by applying the rules of evidence to facts that were not substantially in dispute, and that were subsequently put in evidence again before the jury. It was proved that the appellant, when on oath before a Royal Commission duly appointed and acting within its authority, had been asked questions relevant to the inquiry the Commission was appointed to make, and that he had answered these questions without objection. That, in my opinion, was all the Crown should be required to show to become entitled to have the appellant's answers so given admitted in evidence against him on this trial.

It is, I think, proper, before leaving the question of the admissibility of the appellant's evidence given before the Royal Commission, to note that in answer to a question put to him by counsel for the Crown in the course of appellant's cross-examination on the *voir dire* as to whether the statements he made in the evidence he gave before the Royal Commission were true or not, the appellant said, "At the time the questions were put to me I did not intentionally try to evade the issue by misleading answers. I did in fact try to tell the truth. But on reading it over with a better chance to recollect, I find that several of the answers are not strictly the truth; that in answering the first question put to me I would answer as truthfully as I could, sir. Then following that question I might be asked, on the basis of my answer, several leading questions to make me answer what was not in fact actually true." Upon being invited by the cross-examining counsel to tell of any matters of substance which he

said were untruthfully stated or incorrectly stated, objection to the question was taken by counsel for the appellant, and on the suggestion of the trial judge the question was not pressed, against objection by the appellant's counsel. Counsel for the Crown then asked, "Mr. Mazerall, would this be a fair and correct statement, that throughout the giving of your evidence before the Royal Commissioners you endeavoured to the best of your ability to tell the truth throughout?" The answer was "Yes."

The appellant did not, at this stage of the trial nor before the jury, avail himself of the opportunity that was open to him to point out or to correct or explain any errors or untrue statements in his evidence given before the Royal Commission. It is fair to assume that there was nothing of substance to correct or explain.

The appellant, in his evidence given before the Royal Commission, said that he had been a member of a group interested in studying the theories of Karl Marx, and that one Lunan had got in touch with him. Lunan was on the editorial staff of the *Military Journal*. He had, according to other evidence, been for some time in contact with members of the staff of the Russian Embassy, and had associated himself with them in procuring, for communication to Moscow, information from inside regarding what was going on in various Government departments at Ottawa. To Lunan had been delegated the getting of appellant into their circle of informants—"into the net" is the rather suggestive phrase used at the Embassy. According to the evidence of the witness Gouzenko, the records of the Embassy showed that what it was designed to get the appellant to do was "to give the models of developed radio-sets, its photographs, technical (data) facts and for what purpose it is intended. Once in three month to write the reports in which to characterize the work of Radio Department, to inform about the forthcoming tasks and what new kinds of the models are going to be developed."

The appellant, in his evidence before the Royal Commission, admitted that Lunan had asked him if he would supply him with information for the Soviet Union. He could not recall his own immediate answer, but thought he must have told Lunan that he would think it over. The source of the information he was asked to supply, he admits, would be in the course of his employment. Appellant was not quite certain as to all the details of his interviews with Lunan. At one place there is read to him an extract

from a report of Lunan's to the Russian Embassy in regard to his progress with the appellant, reading as follows, "I gave him a full quota of tasks, and he promised reports on his work and on various other aspects of the general work at his place." He was asked, "What do you say about that?" To this his answer was, "That is true. I told him I would, but I did not." Later in his evidence the following questions were asked and answers given:

"Q. There would be lots of things, of course, in your laboratory that you would not think of giving because they would not be very novel or interesting, I suppose. What was to guide you in selecting information to give to Lunan? A. Just my own interests, I suppose, what I thought they might want.

"Q. What you thought the Soviet people might want, is that so? A. Yes, not actually—well, I suppose it would have amounted to that. There was no definite request for anything specific at all.

"Q. I suppose it did not need to be put in words. You correct me if I am wrong, but you would understand from such a request that Lunan wanted you to give him information that would enable him to pass on to the Russians and keep them apprized of what was going on in the Research Council? A. That is entirely correct."

The appellant did in fact supply Lunan with copies of two reports of his branch of the National Research Council. They are ex. 34, which is a report "re Airborne Distance Indicator", dated 15th July 1945, and ex. 35, which is a report "re Interim and Long Term Proposals covering Short Distance Navigational Systems for Airways and Airport Control", dated 1st June 1945. Appellant's meetings with Lunan occurred in June and July 1945, and the reports were handed to Lunan in July. There was much secrecy in their contacts, and on the occasion when the appellant handed the two reports to Lunan the latter informed him that he (appellant) would be known by the name "Bagley" in their relations. Appellant says that the whole dealings with him were to be secret. He admits that the purpose of handing the reports to Lunan was for the latter to turn them over to the representatives of the Soviet Union for them to make copies of them or read them. Later the reports were returned by Lunan to appellant, on an occasion when, by arrangement, they met on a street corner. The precautions to avoid discovery, which were

enjoined by the Embassy, and which appear to have been faithfully observed by the appellant and others, plainly indicate the unlawful character of their activities, and the appellant's recognition of it. He was asked upon his examination whether he would not speak to Lunan about trying to obtain other information for the Soviet Union, in the event that they met at one of the meetings of the study group. The evidence proceeded as follows:

"A. Oh no, in the group there would be no reference to it.

"Q. There would be no reference to it? A. No, indeed.

"Q. Why do you say 'indeed'? A. Because that would mean that he would have to tell the other people in the group.

"Q. And you wanted that to be kept secret? A. Oh, yes."

The only direct contact the appellant is shown to have had with any person other than Lunan, in regard to supplying information for the Russian Embassy, was with one Durnford Smith. He was an engineer in the Radio Branch of the Research Council. Smith asked appellant if Lunan had approached him, and appellant told him he had. This was subsequent to the handing of exhibits 34 and 35 by appellant to Lunan. Smith wanted to know whether they could get together and pool their information. Appellant did not recall exactly what he replied, except that he did not think he wanted to. He assumed from the conversation that Lunan had spoken to Smith also.

Counsel for the appellant took the point that the appellant may have been influenced to refrain from exercising his privilege to object to answer before the Royal Commission, and thereby to obtain the benefit of s. 5 of The Canada Evidence Act, by a statement that the appellant said, in the course of his examination on the *voir dire*, had been made to him by the police officer in whose custody he was before he gave evidence before the Royal Commission. The statement attributed by the appellant to the police officer was that the appellant would appear before the Royal Commission, and that if the appellant were to "make a clean breast of it" he felt the Commission would take a more lenient view. No question of the appellant having been influenced to forego his right to object to answer was raised at the trial, and there is nothing to support it now, except the ingenious suggestion of counsel. It would require some evidence that the appellant was in fact so influenced before consideration could be given to such an objection, even if the statute warranted the extension of the definitely qualified privilege it allows to cover such a case.

It is objected by counsel for the appellant that there is no evidence to support a finding that the appellant was a party to a conspiracy for the purposes charged in the indictment, that is, for purposes prejudicial to the safety or interests of the State. There was, first, the evidence of one Gouzenko, who had been a member of the staff of the Russian Embassy at Ottawa, describing in considerable detail certain activities on the part of the other persons named in the indictment, as persons with whom the appellant conspired, which had for their purpose the obtaining and communicating, to officials of the Russian Embassy, for transmission to the Government of the Union of Soviet Socialist Republics at Moscow, of information in respect to military, naval and air force arrangements in Canada, inventions, munitions of war, developments in radio and radar, and other matters. It is true that the appellant did not take an active part in all these matters, and probably did not know the full extent of the conspirators' activities. There is, however, ample evidence that he knew of the purpose, in the carrying out of which he was asked to take a part, to supply, for communication to Moscow, information, to be furnished by servants of the Government of Canada, of matters of the character charged in the indictment. The secret and undercover methods adopted, the care to avoid discovery of what was going on, and of who were actively participating, support an inference that a jury could reasonably draw, that the appellant well knew of the existence of a conspiracy that went beyond his own part in it, and that it was of an unlawful character, as charged: *Rex v. Meyrick*; *Rex v. Ribuffi* (1929), 21 Cr. App. R. 94, 45 T.L.R. 421.

Much was made by appellant's counsel of evidence indicating that the information actually supplied by the appellant, through Lunan, to be forwarded to Moscow, was of little value, and that it could have been obtained by the Embassy at Ottawa by ordinary open methods. That one overt act, however, is not all the evidence of an agreement by the appellant to become one of those taking a part in the carrying out of the purpose charged. There was first his definite agreement with Lunan to supply information. All his conduct is to be looked at as well, including his communications and meetings with Lunan, and his conversation with Smith, whom he knew also to be in the plan. Neither is the act of furnishing Lunan with exhibits 34 and 35 entirely

without significance, notwithstanding their lack of any great value for any secrecy of the information they contained, or of any strictly confidential character. It was an act done by the appellant, intended as a contribution to the object of the conspirators. The appellant does not suggest that he was merely playing a game on Lunan in supplying these exhibits, or that his conduct was a mere pretence and not intended as a real compliance with Lunan's request, nor was it so taken by Lunan. The documents were taken to the Embassy to be copied or photographed, and the appellant displayed some interest in having them returned to him. Neither can it be assumed that only information upon new discoveries or developments was of value to be sent to Moscow, and the supplying of it against the interests of Canada. It is not unreasonable to assume that it would be useful to Moscow to know what the activities in the Research Branch at Ottawa really were, from time to time. To have members of its own research staff secretly keeping another Government secretly informed of their work and its results, was prejudicial to the interests of Canada as an independent State.

Appellant's counsel also argued that Gouzenko, who gave evidence of the existence of a conspiracy, and of its purpose, and of what was done to carry it out, was an accomplice, and that his evidence was not corroborated. The appellant's evidence, in my opinion, affords sufficient corroboration.

Upon the whole case it was a matter for the jury ultimately to decide whether the charge of conspiracy was made out upon the evidence. It was within the competence of the jury, in considering their verdict, to make reasonable inferences from the facts proved. There was, in my opinion, evidence before them sufficient to support the conviction, and for the reasons I have stated there was no material evidence of consequence admitted for the Crown that, in my opinion, was not properly admitted.

It is not necessary for the disposition of this appeal that we should consider, or have any opinion upon, the wisdom or propriety of the action of the Government of Canada in passing the Order in Council authorizing the detention of the appellant and others suspected of like misconduct, nor of what was done under the authority of that Order in Council. The appellant's own evidence, given upon the *voir dire* in the course of his trial, makes it plain that his sworn testimony before the Royal Commission was not affected by these matters. His purpose, he says, was still

to tell the truth, and if that condemns him, as, in my opinion, it does, our duty on this appeal is to uphold his conviction. It would be a strange application of a rule designed to exclude confessions the truth of which is doubtful, to use it to exclude statements that the accused, giving evidence upon this trial, has sworn to be true.

In my opinion the appeal should be dismissed.

(I have used the expression "examination on the *voir dire*" throughout the judgment to denote the examination, during the course of the trial, but by the trial judge in the absence of the jury, of witnesses on oath, to enable the trial judge to rule on the admissibility of evidence. That is a common use of the expression in the courts of this Province, although more generally it has been used to denote an examination to determine the competency of a witness, the oath administered being to answer truly all such questions as the Court shall demand of him: see Taylor on Evidence, 12th ed. 1931, p. 880; Roscoe's Criminal Evidence, 15th ed. 1928, pp. 132, 147, 160.)

Appeal dismissed.

Solicitors for the accused, appellant: Hughes and Laishley, Ottawa.

[COURT OF APPEAL.]

Berthiaume et al. v. The City of Ottawa.

Municipal Corporations—Liability for Ice and Snow—Gross Negligence
—*The Municipal Act, R.S.O. 1937, c. 266, s. 480(3).*

A municipality is not an insurer of the safety of persons using its sidewalks and roadways. Its liability for personal injuries resulting from an accumulation of ice or snow upon a sidewalk is limited, under s. 480(3) of The Municipal Act, to cases in which it has been guilty of gross negligence, and this phrase must be interpreted to mean a flagrant or gross breach of ordinary duty, or a breach of duty which approaches the wilful, reckless or wanton. *Huycke v. The Town of Cobourg*, [1937] O.R. 682; *Harper v. The Town of Prescott*, [1939] O.W.N. 492, affirmed [1940] S.C.R. 688; *Leeson v. The Village of Havelock*, [1940] O.R. 331, affirmed [1940] 4 D.L.R. 791, applied; other authorities discussed. The principle underlying the cases is that the statute requires or demands no more than that a municipality shall keep its sidewalks in a reasonably safe condition for persons using them, and if ice, following rain or from other causes, forms upon sidewalks, the municipality is entitled to a reasonable time to do whatever is necessary to safeguard pedestrians who use the streets. In the present case, *held*, reversing the judgment at trial, the evidence did not support a finding that the defendant municipality had been guilty of gross negligence.

AN APPEAL by the defendant from the judgment of Treleaven J., [1946] O.W.N. 471, after a trial without a jury at Ottawa. The facts are fully stated in the reasons for judgment.

30th September 1946. The appeal was heard by HENDERSON, HOPE and HOGG JJ.A.

G. C. Medcalf, K.C., for the defendant, appellant: The trial judge erred in finding gross negligence. Although the walk sloped, there were no inequalities, and the trial judge was clearly in error as to the thickness of the ice and the extent of the slope. A finding that our witnesses would be inclined to minimize the slope is not a finding against their credibility: *Edwards v. Town of North Bay* (1915), 8 O.W.N. 119, 22 D.L.R. 744. To have removed all of the ice would have been very expensive. The sidewalk was examined on the afternoon before the accident, and again when the male plaintiff complained after his wife's fall. There was no condition apparent which required the doing of any work. This is supported by the evidence of other witnesses who passed over this sidewalk frequently, and who said they would have reported any dangerous condition.

The trial judge also erred in finding that the place was not sufficiently sanded. The plaintiffs' witnesses said there was sand on the walk, but little at the particular spot where Mrs. Berthiaume fell. The walk had been sanded only four days before, and one of the witnesses called by the defendant said

that there was sand there on the morning following the accident. On balancing this evidence, the trial judge should have preferred that tendered by the defendant.

The female plaintiff said only that the spot where she fell was slippery; she had no trouble walking until she reached this particular place. The plaintiffs' witnesses exaggerated the condition; they said it had been there all winter, and no work had been done on it. No one complained, although it is well known that the City maintains a complaint office. None of the other witnesses fell on this spot or complained of it.

A memorandum was filed showing the weather conditions and work done at this place during the two weeks preceding the accident. In that period the sidewalk had been scraped, loose snow and ice had been removed, and the sidewalk had afterwards been sanded.

In deciding the issue of gross negligence, there are three principal considerations: notice to us of the condition, our opportunity to remedy it, and the course of action taken by us. [HENDERSON J.A.: As to notice, the spot was examined practically every day, and if conditions were bad you must have known of them.] But did we know of the particular condition which existed at the time of the accident? It arose within a few hours of the accident. There had been thawing, followed by a fall in temperature and freezing. It is impossible to sand all surfaces after such an occurrence, and the municipality can do nothing to prevent such a condition. No knowledge of this particular condition can be imputed here, and there was nothing particularly dangerous about the walk itself. [HENDERSON J.A.: The photographs seem to show a highly dangerous condition.] They also show sand, and the evidence of the photographer is that he took these pictures in such a way as to show the worst possible condition. The weather between the last sanding and the time of the accident had not been such as to call for any additional work.

The trial judge misdirected himself on the question of gross negligence. Gross negligence is a breach of duty approaching the wilful, reckless or wanton, and it must be a flagrant breach of duty: *Harper v. The Town of Prescott*, [1939] O.W.N. 492, [1939] 4 D.L.R. 453, affirmed [1940] S.C.R. 688, [1940] 4 D.L.R. 225. In *Hwycke v. The Town of Cobourg*, [1937] O.R. 682, [1937] 3 D.L.R. 720, it was similarly defined as a flagrant or

gross breach of an ordinary duty. There is nothing here even approaching a flagrant breach of duty.

A slope in ice and snow on a sidewalk is not an abnormal condition, and does not in itself justify a finding of gross negligence: *Mahoney v. City of Ottawa* (1904), 3 O.W.R. 695; *Bleakley v. The Corporation of Prescott* (1886), 12 O.A.R. 637. Nor does a slope in the concrete itself: *Bankey v. The City of Belleville*, [1941] O.W.N. 11, [1941] 2 D.L.R. 165; *Paul v. The Town of Dauphin*, 49 Man. R. 95, [1941] 1 W.W.R. 43, [1941] 1 D.L.R. 775; *Ince v. City of Toronto* (1900), 27 O.A.R. 410, affirmed (1901), 31 S.C.R. 323. The judgment of the trial judge here carries the law further than it has ever gone. It would mean that if there was a slope of ten per cent., and the condition existed for several days, the municipality, if it did not sand effectively, would be liable. In other words, the municipality is made an insurer. We are not bound to sand effectively: *Huycke v. The Town of Cobourg*, *supra*. We must show that we took reasonable measures, not that those measures were effective.

There was no lack of effort on our part to remedy the condition. To hold otherwise would impose an intolerable financial burden on municipalities. There was perhaps a small spot not sanded, but it was impossible to have covered every spot with sand in the time that the condition had existed.

W. R. Burnett, for the plaintiffs, respondents: We adopt the reasons of the trial judge. His findings as to the condition of the sidewalk are supported by the evidence. There was a slope of several inches and a lack of sanding, despite the fact that the condition had existed at that point all winter. If work was done there, it made no appreciable difference. The City has the organization required for a daily inspection of each street.

A slope cannot be treated like a level piece of sidewalk: *Fogg v. The Town of Kenora*, [1940] O.R. 421, [1941] 1 D.L.R. 100. [HOPE J.A.: That case involved a structural defect.] This was not a temporary condition, but had existed all winter.

The leading case as to what constitutes gross negligence is *The City of Kingston v. Drennan* (1897), 27 S.C.R. 46, where it was defined as "very great negligence".

The defendant here knew of the condition: *Holland v. City of Toronto*, [1927] S.C.R. 242, 59 O.L.R. 628, [1927] 1 D.L.R. 99. Notice must be imputed to it. The extent of the risk and

its duration support the finding of gross negligence: *Murphy v. City of Ottawa* (1928), 63 O.L.R. 247, [1929] 1 D.L.R. 465, affirmed [1929] S.C.R. 541, [1929] 4 D.L.R. 590; *Ludgate v. City of Ottawa* (1906), 8 O.W.R. 257; *Seames v. City of Belleville* (1917), 12 O.W.N. 414.

In the last-mentioned case, the condition developed very quickly, but it was held that the City had notice. The case at bar is even stronger than *Fogg v. The City of Kenora*, *supra*, for here there was both a grade and slipperiness. [HOGG J.A.: If the sanding was sufficient, can we uphold the judgment on the basis of the slope alone?] I submit so.

G. C. Medcalf, K.C., in reply: The *Drennan* case involved an accident at a crossing; the *Holland* case turned on the question of slope; *Murphy v. City of Ottawa* dealt with an accident at a notoriously dangerous place; and in *Ludgate v. City of Ottawa* there was an acute slope, and the foreman admitted that he knew of the condition. In *Fogg v. The Town of Kenora*, liability was based upon faulty construction in the concrete, apart from negligence on anyone's part.

Cur. adv. vult.

17th October 1946. The judgment of the Court was delivered by

HOGG J.A.:—This is an appeal from the judgment of Treleaven J., by which he found the appellant guilty of gross negligence with regard to the condition of ice upon a sidewalk on Lewis Street between Elgin and Metcalfe Streets, in the city of Ottawa, on which the respondent Mrs. Lucienne Berthiaume fell, sustaining a compound fracture of one of her ankles.

Under the terms of The Municipal Act, R.S.O. 1937, c. 266, s. 480(3) it is provided that:

“Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk.”

The liability of a municipality, under circumstances such as are alleged to be present in this case, has been discussed in many judgments by our Courts, and the Court of Appeal for Ontario has considered the question in several comparatively recent cases. The governing principle to be gathered from these judgments is that the statute requires or demands no more than that

a municipality shall keep its sidewalks in a reasonably safe condition for pedestrians using the same, and if ice, following rain or from other causes, is formed upon sidewalks, the municipality is entitled to a reasonable time to do whatever is necessary to safeguard pedestrians who walk upon the streets: *The City of Kingston v. Drennan* (1897), 27 S.C.R. 46; *Holland v. City of Toronto*, [1927] S.C.R. 242, 59 O.L.R. 628, [1927] 1 D.L.R. 99; *Blais v. The Town of Sturgeon Falls*, [1939] O.W.N. 370; *Leeson v. The Village of Havelock*, [1940] O.R. 331, [1940] 3 D.L.R. 665, affirmed [1940] 4 D.L.R. 791. In *Kingston v. Drennan*, *supra*, at p. 60, the meaning of the term "gross negligence" in the section of The Municipal Act under consideration was defined as "very great negligence". In *Huycke v. The Town of Cobourg*, [1937] O.R. 682, [1937] 3 D.L.R. 720, in the Court of Appeal, Fisher J.A., who delivered the judgment of the Court, said, at p. 690:

"The object of the Legislature in passing the enactment that gross negligence must be proved, was, I think, to confine the liability of a municipality to cases where the municipality was guilty of a flagrant or gross breach of its ordinary duty—and not an extraordinary duty—to keep its sidewalks reasonably safe for pedestrians using them."

In *Harper v. The Town of Prescott*, [1939] O.W.N. 492, [1939] 4 D.L.R. 453, also in the Court of Appeal, McTague J.A., who pronounced the judgment of the majority of the Court, followed the *Huycke* case and expressed the following opinion:

"When it comes to applying the principle, in general what a plaintiff has to prove under our statute is that there was a breach of the duty to keep the sidewalk reasonably safe for pedestrians using same reasonably, and that the breach of that duty approaches the wilful, the reckless, the wanton; the breach must be flagrant. Mere proof of negligence in the breach is not sufficient."

The Supreme Court of Canada affirmed the judgment of the Court of Appeal in that case, [1940] S.C.R. 688, [1940] 4 D.L.R. 225, although Crocket J., in a dissenting judgment, did not agree with the proposition that the degree of negligence was measurable by the standard of the criminal law and said that none of the previous judgments of the Ontario Courts or of the Supreme Court of Canada, dealing with this question of gross

negligence, had ever ventured to suggest that the enactment required the proof of either wilful, reckless, wanton or flagrant negligence as necessary to fix a municipal corporation with liability for personal injury because of snow or ice upon a sidewalk.

I think it must be taken that the proposition stated by the Court of Appeal in the *Huycke* case and in the *Harper* case—the judgment in the *Harper* case being affirmed by the Supreme Court of Canada—is the law with respect to the meaning of the phrase “gross negligence” in that section of The Municipal Act with which we are now concerned.

In *Leeson v. The Village of Havelock*, *supra*, Gillanders J.A., at p. 343, in discussing the meaning of the phrase “gross negligence”, said:

“The sense I place upon it as here used is that the corporation are not to be liable unless they have not only failed fully to perform the duty of keeping the street reasonably safe for travel, but have been guilty of a gross, or very great negligence in the performance of that duty.”

The learned trial judge here finds that the main issue of fact in the case at bar, “is as to the accumulation of ice upon the sidewalk and the degree of sanding of same by the City for the protection of pedestrians”.

The evidence of the plaintiff Charles Berthiaume, and other witnesses called on behalf of the plaintiffs, is, in effect, that where the accident happened ice had accumulated upon the sidewalk (which was five feet in width), and that this ice formed a slope extending across the sidewalk to the level of the concrete of which the sidewalk was constructed, at the curb, the surface of such ice being about six inches higher at the inner edge of the sidewalk than at the curb, also that there was not sufficient sand at the spot where the accident occurred. There are several discrepancies in the evidence given by several of the witnesses called to testify on behalf of the plaintiff as to the condition of the sidewalk at the time of the accident. They are in accord that there was ice upon the sidewalk and that there was a slope towards the roadway, but one of these witnesses, Charles Cameron, also stated that there was a ridge in the centre of the sidewalk as well as a slope. Apparently this ridge was not present, or it was not noticed by any of the other persons giving

evidence. This witness also said that sand had been put sparingly on the sidewalk up to the time of the accident, that he noticed the lack of sand in the vicinity of the place where Mrs. Berthiaume fell, but that after the accident there was "lots of sand there". He also said: "I know particularly after the accident there was a lot of sand. The next time I went up over the place, there was lots of sand, and the slipperiness was gone, and I walked safely across the spot." The evidence of the City officials is, and their records show, that no sanding was done upon any street in the city after the 6th March 1945. It is to be recalled that the accident happened on the 10th March. I think the evidence given by Mr. Cameron is to be regarded with some doubt as to its being a true exposition of the facts.

Another witness, Thomas Calderwood, testified that the dark streaks shown in a photograph of the sidewalk at the place the accident happened, put in as evidence by the plaintiffs, represented sand, although in the course of his evidence he said that about this point there was no sand at all. The witnesses who testified for the plaintiffs, respecting the condition of the sidewalk, invariably stated that it was slippery and was in need of sanding, but that they had used the sidewalk where the accident happened on numerous occasions during the winter in question and none of them had ever complained to the City that they deemed it to be in such condition that it might prove dangerous and in need of attention.

Several photographs, to one of which I have already made reference, were made evidence by the plaintiffs. They purported to show the condition of the sidewalk at the time of the accident. I think it must always be borne in mind that although photographs show the details of the scene or object in front of the camera, such scene or object may be entirely distorted according to the position and angle of the camera in relation to the scene or object being photographed, and such photographs may therefore convey a totally wrong impression. The photographer, Denault, who took the photographs, recognized this fact as he said he did not take the photograph ex. 6 "straight at the sidewalk" but took it "to show the worst condition possible".

The evidence given on behalf of the appellants by Mr. Frank C. Askwith, the City Engineer, was to the effect that the city of Ottawa has much equipment fitted to deal with the condition of

ice and snow upon the sidewalks of that city. After a fall of snow it is ploughed from all the city sidewalks and then they are sanded. Sand is invariably applied after a rain. A steel horse-drawn scraper or scarifier is used to remove lumps from the sidewalks and so make the surface level. He testified that if there should be a slight thaw at mid-day, followed by a frost at night, it would be physically impossible to sand the 270 miles of sidewalks in the city immediately after such freezing took place. Mr. Askwith said that in Ottawa the standard practice in constructing sidewalks was to have a slope from back to front of one-half inch to each foot of the width of the walk.

The City records, and the evidence given by George Warren, the foreman employed by the City in charge of the sidewalks and streets of the district in which Lewis Street is situated, are to the effect that the scraper was drawn over the sidewalk in question on the 21st and 22nd February; that there was a general sanding of sidewalks throughout the whole of the city on the 24th and 28th February and again on the 4th and 6th March. The work done upon the sidewalks, including the walk in question, was inspected on the 24th and 28th February 1945, and on the 4th and 6th March, and the sidewalk was again inspected on the 9th March, the day before the accident. The weather records show that on the 5th March there was a slight rain in the afternoon, and that from the 6th to the 10th March there was no rain, or, as it is recorded, no precipitation. This witness states that when he inspected the sidewalk on the 9th March, there was sand there and that it was in good condition for the time of the year; also that there was not a six-inch slope and that after the scraping or scarifying done on the 24th February the sidewalk was level for its whole width.

The City of Ottawa conducts a Civic Complaint Bureau which is in charge of some person both day and night. No complaints were received by this bureau with respect to the condition of the sidewalk on Lewis Street between Metcalfe and Elgin Streets from any person at any time during the winter.

Immediately after the accident Robert Davey, an inspector attached to the said Civic Complaint Bureau, visited the scene of the accident. He said there was sand on the sidewalk and that the sidewalk was in a fairly good condition, so that no further work was required to be done at that place.

Several witnesses gave evidence for the appellant, stating that they had used the sidewalk in question at or about the time of the mishap to Mrs. Berthiaume and had no complaint to make about its condition. One of these witnesses, Clifford Earl, is the foreman of maintenance of the Ottawa Public School Board, and said he was interested in the condition of the sidewalks on Lewis Street on account of the school situated on that street. His evidence is to the effect that he did not notice a slope of some six inches at or about the place in question, in the surface of the sidewalk.

With great respect, I am of the opinion, based upon the whole of the evidence, that the learned trial judge was in error in holding the appellant municipality guilty of gross negligence. The municipality is not an insurer of the safety of persons using its sidewalks and roadways. I gather from the reasons for judgment of the trial judge that the conclusion arrived at by him was based upon his finding that there was ice upon the sidewalk forming a slope, together with his finding, that "the place was not sufficiently well sanded to keep it from being very slippery".

That there was a slope of six inches or more across the sidewalk, as is estimated by certain of the witnesses, has not, in my opinion, been established with sufficient certainty, having in mind the fact that no measurement of the slope was made by any person, and also taking note of the type of evidence given by the witnesses Cameron and Calderwood, to which I have already referred. As to the finding that there was a lack of sanding, I am unable to agree, as in my view it is not supported by the weight of evidence. This Court is not bound as to a finding of fact of a trial judge sitting without a jury. Masten J.A. in *Re Beardmore*, [1935] O.R. 526 at 532, [1935] 4 D.L.R. 562, referred to the judgment of Viscount Cave L.C. in *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, where the Lord Chancellor said: "The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference . . . accordingly."

I think the appeal should be allowed and the judgment at trial set aside, with costs of the trial and of the appeal if demanded by the appellant.

*Appeal allowed with costs and action dismissed
with costs.*

Solicitors for the plaintiffs, respondents: McCracken, Fleming & Burnett, Ottawa.

Solicitor for the defendant, appellant: G. C. Medcalf, City Solicitor, Ottawa.

[COURT OF APPEAL.]

**Buckley and The Toronto Transportation Commission v.
Smith Transport Limited.**

Lunatics—Liability for Negligence—Nature and Extent of Delusions—Capacity to Understand Duty to Take Care and Ability to Perform it.

Negligence—Liability—Mental Disease—Capacity to Appreciate and Perform Duty to Take Care.

To create liability for an act which is not wilful and intentional but merely negligent, it must be shown to have been the conscious act of the defendant's volition, and while a lunatic may in many cases be liable in tort, this will not be the case if his lunacy is of so extreme a type as to preclude any genuine intention to do the act complained of. *Slattery v. Haley* (1923), 52 O.L.R. 95 at 99, agreed with. Where an action is based on negligence, and the defendant is proved to have been suffering from insane delusions at the time, the test must be whether, notwithstanding those delusions, he still was able to understand and appreciate the duty on him to take care, and the delusions did not otherwise interfere with his ability to perform that duty. It is always a question of fact to be determined on the evidence, and the burden of proving that a person lacked appreciation, understanding or ability in this respect is on those who allege the fact.

A transport, travelling at a high rate of speed, collided violently with a standing street-car. It was established that the driver of the transport, shortly before and immediately after the collision, had been suffering from the delusion that his vehicle was under remote electrical control, and that he could do nothing to control its speed or course, or to stop it. The driver was found to be suffering from syphilis of the brain, and died, within a month, of paresis. The circumstances were found to be not such as to rebut the presumption that the delusion persisted up to the moment of the collision.

Held, in these circumstances, it should be held that the driver was incapable, by reason of mental disease, of appreciating the duty to take care, and, even if he had been able to appreciate the duty, was unable to discharge it because of the particular delusion. No liability could therefore attach to him, and, since there was nothing to indicate that his employers had put him in charge of the vehicle with knowledge of his mental condition (but rather the reverse), his employers were not liable for the damages resulting from the collision.

AN APPEAL by the defendant from the judgment of Urquhart J. in favour of the plaintiffs, after a trial without a jury at Toronto.

7th October 1946. The appeal was heard by HENDERSON, ROACH and HOPE JJ.A.

E. L. Haines, K.C., for the defendant, appellant: The evidence clearly indicates that Taylor, the driver of our transport, was suffering from insane delusions at the time of this accident, and the trial judge should therefore have found that he was satisfied that Taylor had not been guilty of negligence. He did find that we were not negligent in respect of the maintenance of the truck, and that we had no prior knowledge of Taylor's mental condition, and were not negligent in employing him.

The medical evidence is that the delusion of remote electrical control was very real to Taylor, so that he would act as if that were the fact. An insane person is not civilly liable, if his actions are the result of his insanity: *Slattery v. Haley*, 52 O.L.R. 95, [1923] 3 D.L.R. 156; *Wilson v. Zeron et al.*, [1942] O.W.N. 195, [1942] 2 D.L.R. 580.

The onus section of The Highway Traffic Act, R.S.O. 1937, c. 288, is applicable only when the facts are in dispute, and the Court is unable to come to any definite conclusion on the evidence: *Winnipeg Electric Company v. Geel*, [1932] A.C. 690, [1932] 4 D.L.R. 51, [1932] 3 W.W.R. 49, 40 C.R.C. 1.

I. Fairty, K.C., for the plaintiffs, respondents: The authorities show that a lunatic, in respect of his civil liability for torts, is in almost the same position as a sane person: see *Stanley v. Hayes* (1904), 8 O.L.R. 81; *Taggard v. Innes* (1862), 12 U.C. C.P. 77; *Ryan v. Youngs*, [1938] 1 All E.R. 522; 44 Corpus Juris Secundum, 1945, p. 281. *Slattery v. Haley, supra*, did not concern a lunatic, and the remarks on this point are *obiter*.

The facts here are such that the onus is on the defendant to disprove liability, at common law as well as under the statute.

There is evidence, despite the trial judge's finding, to indicate that the driver's condition should have been known to the defendant, and that it was negligence to allow him on the road: *Donaghy v. Brennan* (1900), 19 N.Z.L.R. 289.

E. L. Haines, K.C., in reply, referred to 21 Halsbury, 2nd ed. 1936, p. 288.

Cur. adv. vult.

24th October 1946. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the defendant from the judgment pronounced by the Honourable Mr. Justice Urquhart on the 16th day of June 1945, awarding damages to the plaintiff Buckley in the sum of \$475 and to the plaintiff Commission in the sum of \$963.13 and costs.

The plaintiff Buckley is a street-car operator employed by the plaintiff Commission and on the night of 5th October 1944, about 9.40 o'clock, he was in charge of one of the Commission's street-cars which was proceeding easterly on Queen Street in the city of Toronto; when it was about two car-lengths west of

Kingston Road, which commences at Queen Street and runs in a north-easterly direction therefrom, Buckley observed a motor transport unit, that is, a tractor with a trailer attached, approaching Queen Street at a speed which he estimated at from 35 to 40 miles an hour, and giving no indication that the driver thereof intended to stop, as he was required to do, before entering Queen Street. The course of the transport and its speed spelled danger to traffic on Queen Street, and Buckley applied the brakes of the street-car and brought it to a stop within about one car-length. The transport continued in its course, without any reduction in its speed, until it was more than half-way across Queen Street and in front of the street-car. The operator of the transport, one Taylor, at that point apparently pulled the steering-wheel violently to the right, and due to the speed at which the unit was travelling it "jack-knifed" and came into violent collision with the front of the street-car, damaging the street-car and injuring the motorman, Buckley.

There is no doubt that the collision was caused solely by the manner in which the transport unit was operated.

The defence, as pleaded and developed in evidence, is that the driver Taylor, suddenly and without warning, had become insane and was labouring under an insane delusion that the transport unit was under some sort of remote electrical control manipulated from the head office of his employer in the city of Toronto, as a result of which he was unable to control the speed of the vehicle or stop it. Under these alleged circumstances, the defendant pleaded that the collision was an unavoidable accident. Taylor was taken into custody immediately after the collision, and in due course was medically examined, and it was found that he was suffering from syphilis of the brain. He died in the Ontario Mental Hospital at Toronto on 3rd November 1944, from general paresis.

Taylor had been in the employ of the defendant only 13 days in the capacity of a motor transport driver. On the day in question, he was on a return trip from Cornwall. He had passed through the city of Kingston, where he had apparently stopped in connection with the company's business, and when he is next heard of he is at a point on Kingston Road near the Hunt Club, about three miles from the scene of the collision. From there he telephoned to the office of his employer in the city of Toronto

and reported that his transport was stalled on the highway. This was an hour or so before the accident. He was told by his employer to remain there, and another driver of the defendant company, who was just about to leave on a trip to Cornwall, was instructed to find Taylor and render assistance and get his transport started. This driver, in due course, arrived at the point on Kingston Road where Taylor's transport unit was stopped. There were flares on the road at the front and rear of the transport, apparently placed there by Taylor. The second driver examined Taylor's transport unit and found nothing the matter with it that affected either the starting or stopping or steering of the vehicle or the control of its speed. He started it and tested it, and sent Taylor on his way. As they were separating Taylor said: "It must be under electric control and the beam must be on." The other driver paid no particular attention to that remark; it was meaningless to him. He was displeased that he should have been required to stop and examine Taylor's unit in view of the fact that there was nothing the matter with it, and he paid no particular attention to Taylor's meaningless remark, but proceeded on his way.

The learned trial judge has found as a fact that immediately after the collision Taylor was insane, and I agree. There was considerable medical evidence that he was also insane before the collision, in the sense that before the collision he was labouring under the insane delusion to which I have referred. One of the medical witnesses called on behalf of the defendant stated in evidence that Taylor unquestionably had been labouring under the delusion before the collision, but on being pressed by the learned trial judge he stated that he might be in the grip of that delusion at one minute and not at another.

The learned trial judge propounded the question for himself, which he put thus:

"Taylor may have been under the aforesaid delusions on Kingston Road at the time of the stoppage, although to be sure he had the wit at that point to put out flares, both front and rear. He may have been under them as he drove along towards Queen Street and even past the stop sign, but can it be said that he was in the grip of these delusions at the time of collision?"

He then answered that question as follows:

"The night was dark, the streets were wet and it was raining. The driver had been delayed by the stoppage at the Hunt Club and he probably was making up for lost time just before the collision. He said upon his questionnaire [which had been obtained from him by the defendant before he was hired] that his eyesight was 'fair'. I think that the probabilities are that he came, without noting it, upon the situation where he suddenly found the fence at the Woodbine race track [which is on the south side of Queen Street directly opposite Kingston Road] looming up before him. He knew he was faced with a situation of danger to himself. He knew he had to turn and turn quickly, and this he did. Therefore he was under no delusion as to his control at the time. As the doctor said, the delusion might be present at one time and not at another, and I think that this was a time when the delusion was not present, and when he was capable of exercising judgment and control."

With great deference to the learned trial judge, I am of the opinion that these conclusions are not justified by the evidence.

The learned trial judge has not stated in terms that he found as a fact that Taylor was suffering from the delusion before the collision, neither has he found in terms that he was not. In my opinion the conclusion is irresistible on the evidence—no question of credibility arising—that Taylor was labouring under the delusion for a considerable time before the collision, as well as after. There is the evidence of the statement made to the second driver who rendered assistance out near the Hunt Club. Witnesses who observed or examined him after the collision, some of them within a matter of minutes thereafter, were all impressed with his honesty, that is to say, that this delusion was very real to him and was not put forward as an excuse. To medical men, including expert psychiatrists, and to all others to whom he talked after the collision, he told a story which he believed to be a fact, that his vehicle was under this remote electrical control even before he was found, as he thought, stalled near the Hunt Club, and continued to be under it to the very moment of the impact, so that he was powerless to prevent the collision. These expert psychiatrists stated in evidence that Taylor would be able, notwithstanding his mental condition, to remember that, as he had previously thought, the vehicle was

under that remote control. That delusion persisted with him continuously until his death. If he was labouring under that delusion within a short time before the collision, as I think it should be concluded that he was, and if he was labouring under that same delusion immediately after the collision, the legal presumption arises that he was also labouring under it at the time of the collision. To require this defendant to prove the existence of the delusion, not only within a reasonable time before and immediately after the collision, but also during the few seconds immediately preceding it, would be to impose a burden of proof which would be most unreasonable. The statement of the medical witness to which I have referred, and to which the learned trial judge has also made reference, proves nothing more than that there could be recurring intervals during which Taylor might not be labouring under the delusion. It does not rebut the legal presumption which arises where there is proof of the existence of the delusion, both before and after the collision, and no evidence of its cessation at the time of the collision. The presumption may, of course, be rebutted, but in my respectful opinion, those circumstances to which the trial judge has referred do not rebut it. Speaking of Taylor, he said:

“He had three options before him. He could have continued straight ahead and crashed into the fence. He might have turned east on Queen Street. In neither of these cases would the loss or damage to the street-car and the motorman have been sustained. He chose, however, to go west, and west was the natural way towards his destination. He knew enough to try and go around the street-car to avoid it, and to get on his right side of Queen Street going west. He did not make the mistake of running up the south side of Queen Street, where there would probably be traffic awaiting the starting up of the street-car. He also had enough control over his vehicle to bring it to a stop [the learned trial judge is doubtless there referring to the fact that Taylor’s vehicle was stopped out by the Hunt Club].

“The above considerations not only leave me in great doubt and far from satisfied that it was not a case of his being negligent, but leave me with the distinct feeling that Taylor at the time of the collision was in possession of his full senses and deliberately made the choice of extricating himself from the position in which he found himself. If he had been under the delusion

at the time, my view is that he would have, in his insane delusion of remote control, continued straight on his way and have gone through the above-mentioned fence."

Before commenting on those reasons and conclusions, may I first quote from the judgment of Cockburn C.J., delivering the judgment of the Court, in *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 at 560:

"The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed;—that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions, which, though the offspring of mental disease and so far constituting insanity, yet leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. No doubt when delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound; just as the body, if any of its parts or functions is affected by local disease, may be said to be unsound, though all its other members may be healthy, and their powers or functions unimpaired."

Here Taylor was suffering from the ravages of a disease which, within less than a month, had caused the complete paralysis of his brain. From the time of the collision to his death his physical condition deteriorated rapidly and the ravages of the disease became increasingly manifest. He was not a raving maniac immediately after the collision. His conduct in the split second immediately preceding the impact, in my opinion, is more consistent with this theory than any other, namely, that, notwithstanding the delusion, he still had some sense of self-preservation, and when at the last moment he saw the fence looming up before him, either his diseased mind prompted him, in the agony of that situation, to make a frenzied effort to avoid

colliding with that fence, or, having been a driver of trucks and transports for a number of years, he almost automatically turned the steering-wheel. Perhaps it was a combination of such an automatic movement and one prompted to some degree by his diseased mind. Certainly he was not contemplating suicide. I should think that there are many persons presently confined in insane asylums who, while suffering from multifarious delusions, still have some sense of self-preservation. Therefore, I would not conclude that his conduct at the last moment before the impact indicated that at that moment, or at any moment prior to it, he had escaped from the insane delusion under which he had previously been labouring.

The fact that he was suffering from that particular delusion does not conclude the question of liability.

In *Slattery v. Haley*, 52 O.L.R. 95, [1923] 3 D.L.R. 156, Middleton J., whose judgment was later sustained by this Court, said, at p. 99:

"I think that it may now be regarded as settled law that to create liability for an act which is not wilful and intentional but merely negligent it must be shewn to have been the conscious act of the defendant's volition. He must have done that which he ought not to have done, or omitted that which he ought to have done, as a conscious being."

He continues in the next paragraph, as follows:

"When a tort is committed by a lunatic, he is unquestionably liable in many circumstances, but under other circumstances the lunacy may shew that the essential *mens rea* is absent; but, when 'the lunacy of the defendant is of so extreme a type as to preclude any genuine intention to do the act complained of, there is no voluntary act at all, and therefore no liability:' Salmond, 5th ed., pp. 74 and 75."

Although that latter statement is only *obiter* in that case, it is supported by English decisions and texts to which that learned judge refers, and I subscribe to it. In my opinion the question of liability must in every case depend upon the degree of insanity.

Supposing a man who was labouring under the insane delusion that his wife was unfaithful to him, but who was otherwise mentally normal, due to the manner in which he operated a motor vehicle on the highway injured some other person on the

highway, no one would suggest that he would not be liable in damages simply because of the fact that he had that one particular insane delusion. Then, add to that one delusion the further delusion that his next-door neighbour was conspiring against him to burn down his house, would he still be liable? I entertain no doubt that he might be liable. He might still be a man who, to use the language of Cockburn C.J., *supra*, would be "in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life". In particular, notwithstanding those delusions, he might still understand and appreciate the duty which rested upon him to take care. That surely must be the test in all cases where negligence is the basis of the action. If that understanding and appreciation exists in the mind of the individual, and delusions do not otherwise interfere with his ability to take care, he is liable for the breach of that duty. It is always a question of fact to be determined on the evidence, and the burden of proving that a person was without that appreciation and understanding and/or ability is always on those who allege it. Therefore, the question here, to my mind, is not limited to the bare inquiry whether or not Taylor at the time of the collision was labouring under this particular delusion, but whether or not he understood and appreciated the duty upon him to take care, and whether he was disabled, as a result of any delusion, from discharging that duty.

The delusion or delusions may manifest the fact that due to mental disease the individual's mind has become so deteriorated or dilapidated or disorganized that he has neither the ability to understand the duty nor the power to discharge it. If I have correctly stated the law, as I think I have, then the question is: What was the extent of Taylor's insanity? Did he understand the duty to take care, and was he, by reason of mental disease, unable to discharge that duty?

To the police constable, within 20 minutes after the collision, he told the story of this remote electrical control. Later that same evening in the police station, he told another officer who interrogated him, "that electricity had pushed him down the hill and he could not stop with this electricity". He said: "It turned me around some loop away out the highway somewhere, and that was where the electricity did the damage."

The day following the collision he was examined by the physician at the Toronto gaol. To that physician he told the story of this remote electrical control having caused the truck to turn off the road at or near Whitby, which is many miles east of the Hunt Club, but did not refer to the fact that he had been, as he thought, stalled at the Hunt Club. That physician found great difficulty in getting facts from him. He did not get a clear story, but as the physician testified, "a few facts could be picked up here and there but he would quite quickly forget the facts and tell us something else, but nothing that was reliable". He said further: "I was able to get some scattered details but I could not make a continued story of it. His answers were slow and poor."

He was seen at the police station the night of the collision by an official of the defendant company, to whom he said: "That machine was under remote control and when you people put the power on I could not do anything." Taylor had a vacant look in his eyes, and his appearance, and the nature of his conversation, were such that that official was frightened.

Having regard to all the evidence, I have reached the conclusion that at the time of the collision Taylor's mind was so ravaged by disease that it should be held, as a matter of reasonable inference, that he did not understand the duty which rested upon him to take care, and further that if it could be said that he did understand and appreciate that duty, the particular delusion prevented him from discharging it. Therefore, no liability for the damages which he caused could attach to him.

Then, is the defendant company liable? The defendant could only be liable if it put Taylor in charge of this vehicle with knowledge of his mental condition. He had been in the employ of the defendant only a few days. He came to it highly recommended by a previous employer. Officials of the defendant company had made careful inquiries as to Taylor's capabilities and reputation. Before permitting him to be in charge of one of their vehicles, they had sent him on a test run with another driver to Cornwall and return. Officials of the company and Taylor's fellow-employees gave evidence at the trial, and they all stated in substance that there was nothing abnormal in his conduct or conversation prior to the collision, apart from the observation which he made to the other driver that night out near the Hunt Club. In

fact, one official of the defendant company was so favourably impressed by Taylor that he stated in evidence that he had thought that the company was fortunate in getting his services.

In my opinion, no liability could attach to the defendant. I would therefore allow the appeal with costs and direct that judgment be entered dismissing the action, with costs.

Appeal allowed with costs and action dismissed with costs.

Solicitor for the plaintiffs, respondents: Irving S. Fairty, Toronto.

Solicitors for the defendant, appellant: Haines & Haines, Toronto.

[COURT OF APPEAL.]

Rex v. Warner, Urquhart, Martin and Mullen.

Criminal Law—Punishment—Matters to be Considered in Imposing Sentence—Object of Punishment—Gravity of Offence—General Attitude of Accused—Previous Record.

The main purpose of the imposition of punishment for crime is the good of the State, or society generally. It is not for purposes of vengeance, but is the expression of the State's condemnation of the wrong done to society, and there must therefore always be a right proportion between the punishment imposed and the gravity of the offence. It is also imposed to deter others from committing similar crimes, and with the object, where possible, of reforming the criminal and restoring him to society.

In determining the punishment to be imposed, the Court should take into consideration the circumstances surrounding the commission of the crime, the attitude of the accused both before and after its commission, his previous criminal record, if any, and his habits as reflected by his conduct and records.

Sentences imposed on two of four youths, charged with murder but convicted of manslaughter only, were increased by the Court in accordance with the foregoing principles.

AN APPEAL by the Attorney-General for Ontario from the sentences imposed on the respondents on their conviction, before Mackay J. and a jury, for manslaughter.

25th and 26th September 1946. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

W. B. Common, K.C., for the Attorney-General, appellant: The principle involved in these sentences, and in the appeal, is one of public interest. It is true that the sentences imposed by the learned trial judge were severe, but in the interest of the public, and to prevent the repetition of such crimes, it is sub-

mitted that all the respondents should be sentenced to imprisonment for life.

H. M. McMaster, for the accused Warner, respondent: The trial judge had ten days (the duration of the trial) to observe the accused and determine what was the proper sentence. The sentences were imposed by a very competent and experienced trial judge, and his judgment should not be interfered with unless he has proceeded on some wrong principle. He told the jury that Warner might be considered the least culpable of all, and in view of Warner's age the sentence imposed on him errs, if at all, on the side of severity.

A. J. C. O'Marra, for the accused Urquhart, respondent: The trial judge did not proceed upon any wrong principle, give undue weight to any factor, or overlook anything which he should have taken into consideration, and this Court should therefore not interfere: *Rex v. Zimmerman*, 37 B.C.R. 277, 46 C.C.C. 78, [1926] 2 W.W.R. 882; *Rex v. Petch*, 35 Man. R. 299, 45 C.C.C. 49, [1925] 3 W.W.R. 434, [1925] 4 D.L.R. 671.

The trial judge, after presiding throughout the trial, is in a much better position than a Court of Appeal to determine what is the proper and appropriate sentence: *Rex v. Nuttall* (1908), 1 Cr. App. R. 180; *Rex v. Carr*, [1937] O.R. 600, 68 C.C.C. 343, [1937] 3 D.L.R. 537.

The sentence imposed on Urquhart is a proper one in the circumstances of the case. *Rex v. Baldwin and O'Sullivan*, [1945] O.W.N. 523, 84 C.C.C. 159, [1945] 3 D.L.R. 543, supports the proposition that in such cases as this there are or may be differing degrees of culpability, and the trial judge here clearly took that principle into consideration.

The sentences imposed have a sufficiently deterrent effect. For the death of one man, four other men have been convicted, and a total of 70 years' imprisonment has been imposed.

J. C. Boland, for the accused Martin, respondent: Martin was only 17 years old when this offence was committed, and in view of this fact his sentence was sufficient. Any longer sentence would deprive him of all hope of ever making anything of his life. He had no previous record, and the jury, by convicting of manslaughter only, have negatived any intention to kill or cause grievous injury to Tobias. We adopt the arguments advanced for Urquhart.

S. P. Ryan, for the accused Mullen, respondent: In determining the appropriate sentence for an offence, a Court should consider (a) the protection of society; (b) the punishment of the offender; and (c) the future welfare of the offender, after the termination of his sentence. Even if these sentences were increased to life, the practical result would not be greatly changed, since in practice a sentence of life imprisonment is ended in about 21 years. If the present sentence stands, Mullen will have forfeited his whole youth, and this should be considered a sufficient punishment for an accidental, though culpable, homicide.

As to the deterrent effect of the sentences, the main deterrent lies in the knowledge that the charge, in case of a repetition of such an offence, would be murder.

The trial judge has great experience in criminal matters, and he did not impose these sentences hastily, but considered them thoroughly. Having regard to all the circumstances, particularly the youth of the accused, the maximum sentence should not be imposed.

It cannot be said that there is any error in principle here; there is ample precedent for a sentence less than life imprisonment for manslaughter. I rely on *Rex v. Baldwin and O'Sullivan*, *supra*, and also on *Rex v. Wambolt*, 13 M.P.R. 409, 71 C.C.C. 301, [1939] 2 D.L.R. 416.

W. B. Common, K.C., in reply: There is a great difference between a sentence of life imprisonment and one of 20 years' imprisonment. Life imprisonment should be imposed, as a deterrent, even where, as here, the defence is that the actual killing was accidental.

Cur. adv. vult.

30th October 1946. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the Attorney-General for Ontario by leave granted under s. 1013(2) of The Criminal Code, R.S.C. 1927, c. 36, against the sentences imposed upon each of the respondents following their conviction for manslaughter on an indictment charging that on or about the 26th day of December, 1945, at the city of Toronto, they unlawfully did murder one Meyer Tobias. The respondents Warner and Urquhart also appealed against their convictions. This Court dismissed the appeals against conviction at the conclusion of the arguments

and reserved judgment on the appeal against the sentence. The sentences were as follows:

On the respondents Warner and Urquhart—15 years each.

On the respondents Martin and Mullen—20 years each.

The appellant in his notice of appeal asked, and counsel for the appellant in argument urged, that, having regard to all the circumstances of the case, the learned trial judge should have imposed upon each of the respondents a sentence of imprisonment for life.

Although the conduct of the trial is not here in issue, I think it should here be said that, as far as the record discloses, the trial was eminently fair. Following the conviction of the accused, and before sentences were imposed, everything was said by counsel for each of them that could reasonably be said. The obvious difficulty of counsel lay in the fact that there was little that could be said in mitigation of the crime.

The late Meyer Tobias met his death as the result of being shot while resisting an armed robbery by the four respondents in his shop on Mount Pleasant Road, in the city of Toronto, in the early evening of the 26th December last. That robbery had been carefully planned by the respondents, and in the intended execution of it each of them was assigned and accepted the particular part which he was to play. It was a joint scheme and undertaking. Martin and Mullen, to the knowledge of both Warner and Urquhart, were each armed with a revolver to facilitate the commission of the robbery. During their abortive attempt, Martin and Mullen each shot off the revolver which he had, Martin twice and Mullen once, and two of these bullets entered the body of their victim, one from Martin's revolver, the other from Mullen's.

The defence was that though thus armed, they did not intend to kill Tobias or cause him any grievous bodily harm, and that the revolvers were discharged accidentally. Martin and Mullen each swore in evidence that his particular revolver was discharged accidentally. That evidence may have been accepted by the jury as the fact, or it may have raised in their minds a doubt as to the intent on the part of those two accused. I must assume that the jury took one or other of those two views, otherwise they should have convicted all of the accused of murder. Whichever of those two views was taken by the jury, I think it can be safely said that they took a very merciful view

of the evidence, and the respondents should consider themselves extremely fortunate that they were not all convicted of murder.

In the story of this crime, that which overshadows every other circumstance connected with it* is the youth of the accused. Their respective ages were as follows: Warner, 16 years; Martin, 17 years; Urquhart, 19 years; Mullen, 20 years. Mullen and Urquhart each had previous criminal records as follows:

Mullen.

1942—March 20th—convicted on 3 charges: (1) shopbreaking and theft; (2) theft; (3) theft. Remanded for sentence and placed on probation for two years.

1944—February 12th—attempted theft; sentence, 3 months in the Ontario Reformatory.

Urquhart.

1943—May 17th—theft; sentence suspended and placed on probation for two years.

1943—May 25th—convicted on three charges: (1) theft; (2) breaking seal of railway car; (3) obstructing a railway track. Sentences—6 months definite and 3 months indeterminate on each charge, the sentences to run concurrently.

1944—March 27th—theft of an automobile; sentence—6 months in the Ontario Reformatory (I do not understand why this was less than the minimum required by The Criminal Code, namely, one year).

The next circumstance that stands out is the cool, callous, deliberate preparation which all the accused made to execute the robbery which they planned. The accused and two other youths, having all met at the home of Urquhart on the morning of 26th December, all came to downtown Toronto shortly after noon, intending to go to a moving-picture theatre. There happened to be a queue of patrons awaiting entrance to the theatre. They were too impatient to take their turn with those patrons, so they walked across the street and, standing there, they planned to rob some store, not particularly Tobias's store but any store, because, as some of them said, they needed a little money. They had some money between them, at least sufficient to pay their entrance into the theatre.

The contrast between their first intention, namely, to go to the theatre, and their second objective, namely, to rob a store, is not without significance. They had time on their hands, so why not rob a store? To execute a robbery required a car, so

they went to a parking lot and Martin and Urquhart stole a car and later picked up the other four, who were waiting near-by. Then, after what would appear to have been more or less aimless driving, they go to a pool-room in the east end of the city. This place, and other places like it, so I gather from the evidence, were their favourite rendezvous. The car which they had stolen could be identified by the licence-plate. That had to be remedied, so Warner and Urquhart go out and steal the licence-plate from another car and substitute it for the one on the stolen car and throw the licence-plate from the stolen car down the sewer. Their arrangements are slowly being completed. Now, they must equip themselves with weapons, so they drive to Martin's home and he gets his revolver, which, to his knowledge, was loaded. One revolver is not sufficient, so they drive to the home of one of the other youths who was with them. He gets the second revolver and gives it to Urquhart, who, apparently earlier that day, had made arrangements to buy it. Now, all arrangements had been completed, save one only, namely, what store would they rob? Then followed some circuitous driving around the city, during which, so they asked the jury to believe, they decided to see if the revolver which Urquhart had was loaded by pointing it either at the floor or the top of the car in which they were driving and pulling the trigger. They did that several times, so they swore, and no shot was fired. The revolver in fact at that time had live ammunition in it, because, on their own story, it was not subsequently loaded. In my opinion, anyone in his right senses could not accept their evidence as to the making of those tests. If the revolver had discharged it was almost certain to draw attention to the car and its occupants and that is the very thing the accused wanted to avoid.

Finally, it was decided that they would rob a particular store on Queen Street East. Urquhart being apparently the most competent driver, it was decided that he should drive, so he and Mullen, who had been driving, at that point exchanged places, and Urquhart gave his revolver to Mullen.

Now we have Martin and Mullen each with a loaded revolver: Urquhart was to stay at the steering-wheel and keep the motor running; Warner's job was to get the money. They arrived at the front of the Queen Street store, all ready to enter it to carry out their plan, just as the proprietor locked the door

and pulled the blind, so that their plans with respect to that place were frustrated.

Then they drove to the north end of the city, and, after making some observations, finally decided to rob the Tobias store. It was now about 6.30 o'clock, and it was dark. They entered the store, Martin first and Mullen next, with their loaded revolvers drawn. Warner was close behind them. Once inside the door, Warner locked it. When Tobias did not at once respond to their demands for his money, Mullen, at the point of the revolver, pushed him into a back room, followed closely by Martin.

As to what occurred in that back room within the next few minutes, we have only the story as told by Martin and Mullen. Substantially, their evidence is as follows:

Tobias made no move to hand over his money, so Martin pointed his revolver at the floor close to the feet of Tobias and shot it off. Tobias then lunged at Martin; a tussle ensued, during which Martin's revolver was again discharged and the bullet struck the body of Tobias. At almost the same instant, Mullen's revolver was discharged and that bullet entered the body of Tobias and he fell to the floor. It may be observed, although I think it makes no difference, that Warner never got into that back room. The three accused at once ran from the store to the waiting car and drove away. They abandoned the car on Yonge Street, a considerable distance from the scene of the crime.

The next circumstance which impresses me is the utter callousness of each of the accused from the time of the commission of the crime to the date of their arrest, two or three days later. That they all knew as they drove away from the scene of the crime that Tobias had been shot there can be no doubt. Either Martin or Mullen, or both of them, so reported to the other two as they drove away. The news that Tobias had died came to all of them either that night or early the next morning through the press and over the radio. One would have thought that in these circumstances the accused would have been overwhelmed with remorse and fear. Mullen alone hid. The others carried on almost as though nothing had happened, frequenting their usual haunts, including the pool-rooms. On the night of the tragedy Warner even went to the moving-picture show, not apparently for the purpose of secreting himself from observation, but merely to satiate his desire for entertainment. The

next night he went again. The night of the tragedy Urquhart also went to the theatre with his "girl friend".

Without further reviewing their conduct subsequent to the shooting, it will suffice to say that it was entirely inconsistent with the theory that this was a crime committed by four youths in an interval when they were subject to impulses which were foreign to their ordinary moods, and that it does not reflect their tendencies and dispositions toward society.

I have referred to the circumstances surrounding the commission of the crime, the attitude of all the accused, both before and after its commission, the ages of the accused, the previous criminal record of two of them, and their habits as reflected by their conduct and records, because these are all matters to be considered in determining what should be the sentence to be imposed on each of them.

It should be said at once that the purpose of punishment for crime is not that, through the medium of a judge who is authorized by law to impose it, vengeance may be wreaked upon the guilty for their crime, as though crime was private in character. In the narrow sense a crime is usually an offence against an individual, involving his person or his property. No doubt the person against whom the offence has been committed, in that narrow sense, or, if he loses his life by the deed, his relatives and associates, unconsciously conceive the idea that punishment should be imposed upon the culprit, causing suffering to him which will bear some proportion to their own, that is to say, that in the suffering of the delinquent they may find some compensation for their own. In the broader sense, in which the courts must regard it, crime is an offence against the State and is punished by the State on much different principles.

The main purpose of the imposition of punishment is the good of the State, that is, society generally. If the culprit by his conduct has demonstrated that he is anti-social, then society excludes him from its membership temporarily or permanently. Punishment is also imposed as a deterrent to others from committing similar crimes. It is the expression of the condemnation by the State of the wrong done to society. There must, therefore, always be a right proportion between the punishment imposed and the gravity of the offence. It is in that sense that it is said that certain crimes "deserve" certain punishments, and not on any theory of retribution. Added to the foregoing,

of course, is the desirability of reforming the criminal wherever that is possible, and restoring him to society.

Wilful persistence in the deliberately-acquired habit of crime marks the offender as an enemy of society in proportion to the extent of such persistence. An individual's actions may indicate his permanent tendencies, or, on the other hand, they may merely be the result of transient moods or momentary impulses. Where we find an individual, over a period of time, pursuing a course of conduct, it is thereby possible reasonably to determine his character or mental attitude. That is why judges consider the previous record of a delinquent in determining the penalty to be imposed upon him. The older and more mature the individual is, the easier it is to determine his character and attitude from his conduct. In a youth the testing-time is short; in the mature man it has been longer. Due regard must also be given to the natural frivolity or irresponsibility of youth as contrasted with the sober sense which comes with maturity.

It would be well-nigh impossible to exaggerate the gravity of the crime of which the accused here were convicted. It was a ruthless, cruel and ghastly crime, and sufficient to arouse, as no doubt it did, a torrent of indignation against the accused among all decent-thinking people. It was such also to reduce decent, law-abiding, peaceful-living citizens to a state of apprehension lest perhaps they be the next victims of a similar crime. Society must protect the lives and property of its members, and those who would thus ruthlessly invade them must be given to understand that they will be properly and adequately punished for their crimes.

Having regard to all the foregoing, and after giving the matter long and anxious consideration, I have reached the conclusion that the sentences which were imposed by the learned trial judge should be varied, and as varied should provide the following terms of imprisonment in the penitentiary: the accused Mullen, 25 years; Martin, 20 years; Urquhart, 20 years; and Warner, 15 years, and I would order accordingly.

Appeal allowed in part.

Solicitor for the Attorney-General, appellant: W. B. Common, Toronto.

[COURT OF APPEAL.]

Guaranty Trust Company of Canada v. Fleming & Talbot.

Judgments and Orders—Final and Interlocutory—Leave to Appeal—Order Permitting Examination for Discovery of Person not Party to Action—The Judicature Act, R.S.O. 1937, c. 100, s. 24.

Discovery—Persons Examinable—Action by Trustee of Bankrupt Company—Attempted Examination of President of Company—Rules 327, 334, 335—The Interpretation Act, R.S.O. 1937, c. 1, s. 32(ze).

An action was brought in the name of the trustee of C.D. Ltd., an undischarged bankrupt. The defendants took out an appointment for the examination of S, the former president of C.D. Ltd. The Master dismissed an application by S to set aside the appointment and the subpoena served on him. An appeal from this order was dismissed, as was a subsequent motion for leave to appeal to the Court of Appeal. S then appealed without leave, and the defendants moved to quash the appeal.

Held, (1) The appeal lay without leave. As between the parties to the appeal, the order was not an interlocutory one within the meaning of s. 24 of The Judicature Act, but was a final order, since it finally disposed of the only issue between them, *viz.*, the question whether or not S could be compelled to attend and submit to examination for discovery in an action in which he was neither a party nor the officer or servant of a corporation which was a party. The order in appeal was no doubt interlocutory as between the parties to the action, but as between the present appellant and respondents it was final.

(2) The appeal must be allowed, and the appointment and *subpoena* must be set aside. The proposed examination could be justified only under Rules 334 and 335, and those Rules provided only for the examination of individuals, and made no provision for the examination of an officer or servant of a corporation. There was no principle of construction upon which Rule 327(2) could be read with Rules 334 and 335.

AN APPEAL by Eric Duff Scott from an order of Wilson J., dismissing an appeal from an order of the Master, who had refused to set aside an appointment and *subpoena* for the examination for discovery of the appellant. Leave to appeal from the order of Wilson J. had been refused by Urquhart J. The proceedings below are fully reported in [1946] O.W.N. 564, and the reasons of Urquhart J. are also reported in [1946] 3 D.L.R. 385. The respondents served notice that at the opening of the appeal they would move to quash the appeal on the ground that the order of Wilson J. was an interlocutory one, and that no leave to appeal had been obtained.

7th October 1946. The appeal and the motion to quash were heard by ROBERTSON C.J.O. and FISHER and LAIDLAW JJ.A.

G. A. Gale, K.C. (J. T. Weir with him), for the defendants, respondents, on the motion to quash: There is no right of appeal without leave, under s. 24 of The Judicature Act, R.S.O. 1937, c. 100, since the order in appeal is interlocutory only, in that it does not determine the real matters in dispute between the

parties: *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580. [ROBERTSON C.J.O.: But the appellant is not a party to the action. Does not the order finally determine his rights so far as this litigation is concerned?] Middleton J.A., when he spoke of "parties" in the *Hendrickson* case, at p. 678, intended to limit himself to the actual litigants alone. That is made clear by him in *Roblin v. Drake*, [1938] O.R. 711 at 712, [1938] 4 D.L.R. 758. [ROBERTSON C.J.O.: Here the appellant moved to set aside the appointment. If he had failed to attend and you had moved to commit him, and an order had been made accordingly, could you then say that the committal order was merely interlocutory?] Perhaps not, but in that case the liberty of the subject would be involved, and the *Hendrickson* case lays down the rule that in determining whether or not an order is interlocutory, the Court will look only at the order which has in fact been made. In any event, the matter is one of procedure, and an order which determines only a question of procedure is, generally speaking, considered an interlocutory one: *Roblin v. Drake*, *supra*.

R. M. Willes Chitty, K.C., for the appellant, on the motion to quash: The order, though it may be interlocutory as to the parties to the action, is clearly final so far as the appellant is concerned, since it finally determines that he is liable to be examined: Compare *Osolsky v. Schwartz* (1929), 37 O.W.N. 121.

[THE COURT reserved judgment on the motion to quash, and directed counsel to proceed with the argument on the substantive appeal.]

R. M. Willes Chitty, K.C., on the appeal: This action, although it is in name brought by the trustee in bankruptcy of Canadian Depositors Limited, is in fact brought by a large creditor of the bankrupt company in the trustee's name. There is no question here of an assignment, and Rule 335 has no application, except in so far as some of the cases decided under that Rule may have a bearing on the construction which should be put upon Rule 334. The proposed examination is to be justified, therefore, only under Rule 334, on the ground that the action is brought for the immediate benefit of the bankrupt company. An action brought by a trustee in bankruptcy may be for the ultimate benefit of the debtor, but the immediate benefit clearly goes to the creditors; the trustee in bankruptcy is a trustee, not for the debtor, but for the creditors, and the only benefit to a debtor from such an action would arise in rare cases where the estate shows a

surplus after creditors' claims have been satisfied. That is a "mediate" rather than an "immediate" benefit: *Trusts and Guarantee Co. v. Smith*, (1915), 33 O.L.R. 155, 21 D.L.R. 711.

Even if it could be said that the action is brought for the immediate benefit of the bankrupt company, Rule 334 still does not permit the proposed examination of an officer of that company. The learned Master applied s. 32(*ze*) of The Interpretation Act to make the word "person" in Rule 334 include a corporation, but he overlooked the opening words of s. 32, *viz.*, "In every Act unless the context otherwise requires". The context here clearly does otherwise require. The only provision for the examination of an officer of a corporation is to be found in Rule 327(2), and Rule 327 clearly applies to parties to the action, so that clause 2 authorizes the examination of an officer of a corporation only where the corporation is a party to the action: *Bank of Toronto v. Quebec Fire Ins. Co.* (1897-8), 18 P.R. 41. *May v. Roberts*, 48 B.C.R. 411, [1934] 1 W.W.R. 798, 15 C.B.R. 464, is not properly distinguishable on the grounds suggested by the learned Master, because the provision in our Rules against the reading at the trial of the examination for discovery of an officer of a company is in Rule 327(2), applying, as has been said, only to corporations which are parties to the action. This attempted distinction, however, serves to emphasize the fact that Rule 334 cannot have been intended to apply to an officer of a corporation for whose benefit an action is brought, because if it had been intended so to apply it would obviously have provided for the exclusion of the examination at the trial.

The other cases cited, both by the Master and by Urquhart J., are clearly distinguishable. In none of them was a trustee in bankruptcy, or a corporation, involved, and clearly different considerations arose. *Gough v. Toronto and York Radial R.W. Co.* (1918), 42 O.L.R. 415, dealt with an entirely different point, and the statement of Middleton J. in that case, quoted here by Urquhart J., was obiter.

It is submitted that the only questions to be decided on this appeal are: (1) whether the appellant is a person for whose immediate benefit the action is brought; (2) whether Rule 334 was ever intended to apply to a corporation; and (3) if so, whether the Court is justified in legislating by incorporating the provisions of Rule 327(2) into Rule 334.

G. A. Gale, K.C.: The appellant is examinable under both Rule 334 and Rule 335.

He is liable to be examined, first, as a person for whose benefit the action is brought, under the provisions of Rule 334. Certainly, in an action by the trustee of an insolvent person, the debtor is a person for whose immediate benefit the action is prosecuted: *Macdonald v. Norwich Union Ins. Co. et al.* (1884), 10 P.R. 462; *Garland v. Clarkson* (1905), 9 O.L.R. 281; *Tollemache v. Hobson* (1897), 5 B.C.R. 214; *Johnston v. McIntosh* (1883), 3 C.L.T. (Occ. N.) 313. [LAIDLAW J.A.: How can it be said that the debtor company in this case can benefit immediately by the action, in view of the fact that it is brought by a creditor and not by the trustee?] There may be a surplus as a result of the action, in which case the debtor company will receive that surplus, and in any event, if the action succeeds a debt will be liquidated which would otherwise be outstanding. In addition, it is put in a more favourable position in the event of its applying for a discharge.

Assuming that the action is for the benefit of the debtor company, it comes within Rule 334 by virtue of s. 32(*ze*) of The Interpretation Act, R.S.O. 1937, c. 1, which provides that the word "person" in a statute shall include a corporation, and the effect of which is extended to the Rules by s. 6 of the same Act and s. 106 of The Judicature Act. [LAIDLAW J.A.: But that meaning is to be given to the word only unless the context otherwise requires, by the opening words of s. 32.] The wording of Rule 334 does not exclude this interpretation of "person". In Rule 333 the context obviously excludes such an interpretation of the word.

Since discovery may be had against the debtor company under Rule 334 (and, for the same reasons, under Rule 335), that right can be made effective by resort to the provisions of Rule 327(2). [ROBERTSON C.J.O.: But Rule 327 deals only with parties to the litigation, either individuals or corporations.] We submit that while clause 1 of Rule 327 is limited to parties to the action, clause 2 is not so limited, but extends to the examination of officers or servants of corporations generally. Otherwise the draftsman of the Rules would have indicated that clause 2 was to be restricted to cases where the corporation in question was a party to the litigation: *Gough v. Toronto and York Radial R.W. Co. supra* at p. 417. [ROBERTSON C.J.O.: How do you

distinguish *Bank of Toronto v. Quebec Fire Ins. Co. supra*, and *May v. Roberts, supra*?] In the *Bank of Toronto* case the Court did not consider whether the officer in question could have been examined under the provisions of what is now Rule 334, so it cannot be said to be an effective or binding authority on that Rule. It is not clear from *May v. Roberts* what Rule was being applied, but in any event the learned judge there was moved by the fact that an examination, if permitted, could be used on the trial against the trustee, and as a matter of discretion, if nothing else, he declined to make the order. In Ontario the examination cannot be used against the plaintiff at the trial; it is being sought only as a medium of discovery. We refer also to *Argles v. Pollock* (1917), 12 O.W.N. 158; *Patterson v. Toronto General Trusts Corporation* (1918), 15 O.W.N. 42.

R. M. Willes Chitty, K.C., in reply.

Cur. adv. vult.

30th October 1946. ROBERTSON C.J.O.:—This appeal is from an order of Mr. Justice Wilson, dated 1st May 1946, dismissing an appeal of Eric Duff Scott from an order of the Master, dated 13th April 1946, which dismissed the appellant's application for an order setting aside an appointment and *subpoena* requiring the appellant to attend for examination for discovery at the instance of the defendants in the action.

Appellant is not a party to the action, nor is he an officer or servant of any party to the action. The plaintiff, Guaranty Trust Company of Canada, in whose name the action is brought, is the trustee in bankruptcy of Canadian Depositors Limited, an undischarged bankrupt. Appellant is alleged to be examinable as an officer of Canadian Depositors Limited.

The action is upon a contract alleged to have been made between the bankrupt company and the defendants, and damages are claimed for breach of that contract. The defendants allege material misrepresentation on the part of Canadian Depositors Limited in the making of the contract.

The defendants, in support of the right they claim to examine the appellant for discovery, rely upon Rules 334 and 335, which are as follows:

"334. A person for whose immediate benefit an action is prosecuted or defended may without order be examined for discovery.

"335. Where an action is brought by an assignee the assignor may without order be examined for discovery."

The Master held that the appellant was examinable.

Before dealing with the substantive appeal it is necessary to dispose of a preliminary motion by the respondents to quash the appeal on the ground that it is an appeal from an interlocutory order, and that leave to appeal from the order of Wilson J. was not obtained, but was in fact refused by Urquhart J. Section 24 of The Judicature Act, R.S.O. 1937, c. 100, is referred to.

As between the appellant and the respondents I do not think that the order is interlocutory. It finally disposes of the only question in issue between them, that is, the question of the right of the respondents to compel the appellant to attend and submit to examination for discovery in an action to which he is not a party, nor is he the officer or servant of any corporation that is a party. To say that as between the plaintiff and the defendants the proceedings in relation to the examination of the appellant for discovery are interlocutory, is no doubt right, for none of the issues in the action between the parties to the action is determined thereby. The appellant is, in no sense, a party to those issues. The issue he has raised is one entirely personal to himself. He says that the defendant in the action has no right to bring him, a stranger to the action, before an examiner and make him answer questions for purposes of discovery. He disputes the right that the defendants allege they are given in respect of examining him, under the Rules of Practice.

In my opinion this is an issue that the appellant has a right to raise, and it is quite distinct from the issues to be tried in the action between the parties to it. The order of Wilson J. finally determined that issue, subject to any right of appeal there may be. To hold that the order of Wilson J. disposing of appellant's application is not an interlocutory order within s. 24 of The Judicature Act, but is a final order, does not in the least conflict with anything said in such cases as *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580, and *Roblin v. Drake*, [1938] O.R. 711, [1938] 4 D.L.R. 758. There was no question involved in the appeals in the cases referred to, as there is here, between one of the parties to the action and a stranger to the action. If the order in appeal stands, the appellant must attend before the examiner and submit to examination for discovery by the respondent in an action to

which he is no party, or become liable to punishment for contempt. I would dismiss the motion to quash the appeal.

An illustration of an appeal being entertained from a somewhat similar order by one who was a stranger to the action is to be found in *Goodeve v. White* (1893), 15 P.R. 433. There the Court of Appeal entertained an appeal from an order, made in a County Court case, for the examination of the appellant as a person to whom a judgment debtor had made a transfer of his property, the jurisdiction of the Court of Appeal being restricted to the hearing of appeals from orders in their nature final, and not merely interlocutory. (The County Courts Act, R.S.O. 1887, c. 47, s. 42).

Dealing then with the substantive appeal, it is to be observed that neither Rule 334 nor Rule 335 makes any provision for the examination for discovery of an officer or servant of a corporation. It does not carry the argument any farther to interpret the word "person" in Rule 334, or the word "assignor" in Rule 335, as extending to a corporation. That alone does not cover the examination of an officer or servant of a corporation. When it is intended by the Rules of Practice to give the right to examine for discovery an officer or servant of a corporation, express provision to that effect is made. That is what is done by Rule 327, which, by clause 1, provides that a party to an action, whether plaintiff or defendant, may be examined for discovery by any party adverse in interest. The Rule then, in clause 2, makes provision for the case of a corporation by providing that any officer or servant of such corporation may, without order, be orally examined by any party adverse in interest. Rule 327, however, deals only with the right to examine for discovery as between parties to the action. Without the special provision contained in clause 2 for the case of a corporation, there would be no right to examine for discovery an officer or servant of a corporate plaintiff or corporate defendant. The right to do so depends entirely upon the Rule itself, and the right it gives has been varied from time to time by amendments of the Rule.

I am not aware of any principle of construction by which clause 2 of Rule 327 can be read into Rules 334 and 335, or either of them. The fact that express provision is made by Rule 327 for the examination of an officer or servant of a corporation which is a party to the action, while no provision is made

for such an examination by Rule 334 where a corporation is the person to be benefited by the action, or by Rule 335 where a corporation is an assignor, would seem, upon ordinary principles of construction, to be the plainest indication that no such right was intended to be given by either of the latter two Rules.

In a case where the intention is so plainly indicated it is not important to search for grounds upon which it may be said to be reasonable that the right to examine for discovery should be so limited. It is enough that the Rules do not grant the right. It is sometimes suggested that the right to examine for discovery is abused, and that some limitations upon it, or some change in the manner of obtaining discovery, as, for example, by interrogatories submitted in writing, would be advisable. In any event, the right to examine this appellant for discovery in this action depends upon the Rules of Practice, and, where they are silent, no right to examine for discovery a stranger to the action can be recognized.

The appeal should be allowed, and the *subpoena* and appointment for examination should be set aside. The appellant should have costs of the appeal and of the motions before Wilson J. and the Master.

FISHER J.A.: I agree with the reasons and conclusions of my Lord the Chief Justice, and have nothing to add.

LAIDLAW J.A.:—This is an appeal from an order of the Honourable Mr. Justice Wilson in chambers, dated the 1st May 1946, dismissing an application by way of appeal from an order of the Master dated the 13th April 1946. When the appeal to this Court came on for hearing, counsel for the respondents made application for an order quashing the appeal on the ground that the order in appeal, dated the 1st May 1946, is an interlocutory order and that no appeal therefrom lies to this Court because leave to appeal had not been obtained as provided in the Rules of Practice. The Court heard argument on the application and reserved judgment, and thereafter heard argument on the merits of the appeal. I proceed at once to consider and discuss the preliminary objection and application made on behalf of the respondents.

The facts and course of proceedings leading to the order in appeal may be briefly stated. Canadian Depositors Limited, a corporation incorporated under the Dominion Companies Act,

was adjudged bankrupt by an order of the Registrar of the Supreme Court of Ontario in Bankruptcy dated the 14th December 1942. Subsequently, namely, on the 4th January 1943, the plaintiff was appointed trustee of the estate of the debtor. The trustee neglected or refused to take proceedings against the defendants, and General Petroleums Limited, a creditor of the debtor, was authorized to commence proceedings in the name of the trustee by an order of the Registrar of the Supreme Court of Ontario in Bankruptcy dated the 20th September 1943. By that order it was provided, *inter alia*, that "all benefits to be derived from the proceedings authorized by this Order together with full costs of same, do belong exclusively to the applicant and to such other creditors of the said Debtor who may within seven days of the service upon them of the notice of the granting of this Order . . . agree to contribute pro rata according to the amount of their respective claims to the expense and risk of such proceedings" The action was commenced by writ of summons issued on the 13th October 1944. The statement of claim was delivered on 13th October 1944, and the statement of defence on the 29th November 1944. The defendants obtained an appointment, dated the 19th March 1946, from a Special Examiner for the examination for discovery of "Eric Scott, President of Canadian Depositors Limited". Notice of the appointment and *subpoena* directed to "Eric Scott" was served upon him. He was required thereby to attend at the time and place of the appointment and to bring with him and produce "all Books, Contracts, Agreements . . . and all other writings and documents in [his] possession or under [his] control in any way relating to the matters which are within the scope of this proceeding or have any reference thereto". Mr. Scott thereupon made application to the Master for an order setting aside the appointment, notice and *subpoena*. That application was dismissed, as stated, by order of the Master, and an appeal therefrom was dismissed by the Honourable Mr. Justice Wilson in chambers by an order dated the 1st May 1946, *supra*. The appellant applied to the Honourable Mr. Justice Urquhart in chambers for leave to appeal from the order of the Honourable Mr. Justice Wilson, and that application was dismissed by order dated the 15th May 1946. On the same day, and within the time permitted by the Rules, the appellant gave notice of appeal to this Court from the order pronounced by

the Honourable Mr. Justice Wilson. The respondents thereafter, on the 30th May 1946, gave notice to the appellant that at the opening of the appeal an application would be made for an order quashing the appeal on the grounds mentioned above.

The respondents rely on the provisions of s. 24 of The Judicature Act, R.S.O. 1937, c. 100, as follows:

"There shall be no appeal to the Court of Appeal from any interlocutory order whether made in court or chambers, save by leave as provided in the rules."

There is no definition of "interlocutory order" in the statute or in the Rules of Practice. Moreover, no precise or exhaustive definition can be found in reported cases. On the contrary, learned jurists have expressly refrained from formulating any such definition. It is extremely difficult and perhaps impossible to lay down any general rule applicable in all cases to test the nature of a judgment or order for purposes of deciding whether an appeal from it lies without leave as provided by the Rules. Any test proposed must be applied with great care to the particular case under consideration. The question is not a simple one, and the opinions expressed from time to time are not consistent.

In England there are at least two series of cases. In *Bozson v. Altrincham Urban District Council*, [1903] 1 K.B. 547, the Earl of Halsbury L.C., at p. 548, referred to the fact that the authorities were not in harmony. He considered the cases of *Shubbrook v. Tufnell* (1882), 9 Q.B.D. 621, and *Salaman v. Warner et al.*, [1891] 1 Q.B. 734, and preferred to follow the earlier decision of *Shubbrook v. Tufnell*. Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council*, *supra*, said that the real test for determining the question ought to be:

"Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

In *Isaacs & Sons v. Salbstein et al.*, [1916] 2 K.B. 139 at 147, Swinfen Eady L.J. concludes that the decision in *Bozson v. Altrincham Urban District Council*, *supra*, puts the matter on the true foundation "that what must be looked at is the order under appeal". Pickford L.J., in the same case, places his judgment on that foundation. Many of the cases in point

are considered and discussed in *Spelman v. Spelman*, 59 B.C.R. 120, [1943] 3 W.W.R. 181, [1943] 4 D.L.R. 248.

In *Re City of Toronto and Toronto R.W. Co.* (1918), 42 O.L.R. 413 at 414, Middleton J. says:

“When an action has been brought, then all applications in that action are interlocutory, within the meaning of the Rules, unless the application determines the merits of the action, e.g., a motion for judgment, or an appeal from a determination upon a motion for judgment or a hearing.”

In *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580, the same learned jurist discusses the question at length and, at p. 678, says:

“The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties—the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.”

This test was applied in *Roblin v. Drake*, [1938] O.R. 711, [1938] 4 D.L.R. 758. *Hendrickson v. Kallio*, *supra*, is referred to in *Baker v. Dumaresq*, [1934] S.C.R. 665 at 675, [1935] 1 D.L.R. 148, and *Halbert et al. v. Netherlands Investment Company of Canada Limited*, [1945] S.C.R. 329 at 337, [1945] 2 D.L.R. 418.

A very plain and important distinction between the cases to which I have referred and the one presently under consideration must be made. The question in controversy in those cases was one between parties to the action. The governing consideration in determining whether the order in question was interlocutory or not was the effect of such order on the matter in dispute in the action. In the present case the appellant is not a party to the action. He is a member of the public whom the respondents seek to examine for discovery in the course of an action to which he is a stranger, and the fact that he was or is president of Canadian Depositors Limited does not alter his position in considering the question which now arises. A proceeding was initiated against him by the respondents which, in my opinion, does not place the respondents in any better position than if they had instituted separate judicial proceedings seeking a right to compel the appellant to submit to an examina-

tion. In any such proceedings, and in the one taken by the respondents, the appellant could properly maintain that under the Rules of Practice the respondents do not possess the right to examine him as claimed by them. Upon application made on behalf of the appellant to the Master, the real matter in dispute between the respondents and the appellant was this: Have the respondents a right to compel the appellant to attend on an examination for discovery in an action to which he is not a party? Or, in other words, is the appellant entitled in law to refuse to attend upon such examination? If this question had been determined adversely to the appellant in separate judicial proceedings between him and the respondents, it cannot be doubted that a judgment or order would be appealable by him to this Court as of right. His rights are not less by reason of the fact that the respondents are defendants in a pending action.

If one seeks with care to apply the test proposed in cases to which I have made reference, the result will be as follows: The order in question does finally dispose of the rights of the parties as I have described them. Therefore, by applying the test proposed by Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council*, *supra*, the order in appeal must be treated as a final order and not as an interlocutory order. Likewise, applying the rule quoted from *Hendrickson v. Kallio*, *supra*, the order in appeal determines the real matter in dispute between the respondents and the appellant. The merits of the case as between those parties have been finally disposed of. I find support for my opinion in *Bassel's Lunch Ltd. v. Kick et al.*, [1936] O.R. 445, [1936] 4 D.L.R. 105. In that case the plaintiff in the action appealed to the Court of Appeal from an order of Kingstone J. dismissing a motion by the plaintiff for writs of attachment for contempt of court against the respondents, who were not parties to the action. It was held that the order of Kingstone J. dismissing the plaintiff's motion was a final order, and not merely interlocutory. At p. 455, Riddell J.A. says:

"The respondents are not parties to the action; no proceedings are taken against them except one to stop their interfering with the plaintiff's business; the order appealed from denies the plaintiff this relief, finally and absolutely"

I have concluded that the order in appeal is a final determination of the real subject matter in dispute between the appellant

and the respondents. It finally and absolutely disposes of the right of the appellant to refuse to attend and be examined for discovery by counsel for the respondents. Hence, my opinion is that an appeal from the order of Wilson J., dated the 1st May 1946, lies to this Court without leave. The application made on behalf of the respondents for an order to quash the appeal must accordingly be dismissed, with costs.

I shall proceed to consider the merits of the appeal.

Counsel for the respondents claims the right to examine the appellant for discovery by virtue of Rules 334, 335 and 327 (2). Rule 334 is as follows:

“A person for whose immediate benefit an action is prosecuted or defended may without order be examined for discovery.”

It is first argued that Canadian Depositors Limited is a “person” within the meaning of that word as used in the Rule, because by the statutory definition contained in s. 32(*ze*) of The Interpretation Act, R.S.O. 1937, c. 1, the word “person” shall include a body corporate.

But that section of the statute also expressly provides that the statutory definitions therein set forth are applicable “unless the context otherwise requires”. Suppose for the moment that the words “body corporate” be read into Rule 334. The result is meaningless and of no effect whatever. A body corporate cannot as such be examined for discovery, and the Rule omits entirely any provision for examination of an officer or servant of a corporate body who might, on the interpretation suggested, fall within its provision. The only reasonable conclusion is that a corporate body does not come within the meaning of the word “person” as used in the Rule, and the context requires that the word be given its ordinary meaning. It is urged that Rule 327 (2) should be read with Rule 334, and that when they are so read there is no omission and no difficulty in procedure. In my opinion, those Rules cannot be read together. They relate to examinations of two entirely different classes of persons. Rule 334 provides for the examination of a person who is obviously not a party to an action. Rule 327 provides for the examination of parties to an action. Again, clause 2 of Rule 327 is not severable from clause 1 of the same Rule, but is an integral part thereof. It cannot properly be made to apply to an examination

of a person who is not a party to an action and is not applicable to an examination under the provisions of Rule 334.

The argument that this action is prosecuted for the "immediate" benefit of Canadian Depositors Limited, within the meaning of Rule 334, cannot be given effect in any event. It is suggested by counsel that a judgment in favour of the plaintiff might improve the position of the company financially, or, upon subsequent proceedings by it, on an application for discharge from bankruptcy. There is no evidence before this Court as to the assets or liabilities of Canadian Depositors Limited, or of the amount of the claim by the creditor General Petroleums Limited or other creditors who caused the action to be brought. One pertinent fact appears, however, and that is that the trustee of the estate of the bankrupt company did not see fit to institute the proceedings and refused or neglected to do so. It may be reasonably concluded that, in his opinion, there would be no benefit to the estate from the action. But whatever benefit Canadian Depositors Limited might obtain from the successful prosecution of the action, it would, in my opinion, be "mediate" and not "immediate". Moreover, it does not follow that a benefit to Canadian Depositors Limited, of whatever kind it might be, would be a benefit to the appellant. The appellant is the "person" sought to be examined under Rule 334, and the facts and the argument before this Court do not disclose to me that the prosecution of the action would be of any benefit whatever to him.

My judgment may be put on another ground. The commencement of this action was authorized by an order of the Registrar of the Supreme Court of Ontario in Bankruptcy dated the 20th September 1943, and by the provisions of that order all benefits to be derived from the proceedings belong exclusively to General Petroleums Limited, a creditor of Canadian Depositors Limited, and certain other creditors. That provision of the order appears to be inconsistent with s. 69(2) of The Bankruptcy Act, R.S.C. 1927, c. 11, by which provision is made that "Any benefit derived from the proceedings shall to the extent of his claim and full costs, belong exclusively to the creditor instituting the same." I need not consider or discuss any such inconsistency because, in either case, the provision shows that the action is not prosecuted for the immediate benefit of the appellant. So far as appears, the order of the Registrar, *supra*,

has not been the subject of appeal or of modification in any way, and a decision of this Court that the action is prosecuted for the immediate benefit of the appellant would clearly be inconsistent with that order and with the express provision in s. 69 of The Bankruptcy Act. We should not create such an inconsistency.

Counsel for the respondents refers to and relies on the following cases: *Macdonald v. Norwich Union Ins. Co. et al.* (1884), 10 P.R. 462; *Minkler v. McMillan* (1884), 10 P.R. 506; *Garland v. Clarkson* (1905), 9 O.L.R. 281. Those cases are distinguishable. In *Macdonald v. Norwich Union Ins. Co. et al.*, it was made plain that the plaintiff was acting as an agent for the person to be examined. The action was to collect a debt, and the plaintiff was to pay the proceeds of the action as the person to be examined directed. *Garland v. Clarkson* follows *Macdonald v. Norwich Union Ins. Co. et al.* In *Minkler v. McMillan*, the person to be examined was interested in the subject matter of the litigation "just as much as the plaintiff". The plaintiff was under an obligation to account to that person for the proceeds of the action. The cases mentioned are also clearly distinguishable upon the facts and the circumstances under which the present action was commenced.

Rule 335 does not give to the respondents the right to examine the appellant. He is not an assignor and the plaintiff is not an assignee from him. The Rule is clearly inapplicable to the facts of this case.

My conclusion is that the respondents have no right to examine the appellant for discovery and that the notice of appointment for examination for discovery and *subpoena* served on him cannot stand. I would, accordingly, allow this appeal and set aside the order of the Honourable Mr. Justice Wilson dated the 1st May 1946. In place thereof the appeal from the order of the Master dated the 13th April 1946 should be allowed. I would also allow the appellant the costs of this appeal and of the appeal to the Honourable Mr. Justice Wilson in chambers and of the application to the Master.

Appeal allowed with costs throughout.

Solicitor for the applicant, appellant: H. G. Donley, Toronto.

Solicitor for the defendants, respondents: R. D. Humphreys, Oshawa.

[McRUER C.J.H.C.]

Scott v. Scott and Pfeil.*Divorce—Collusion—Agreement by Husband as to Monthly Payment of Maintenance and Continuing of Insurance Policies.*

There cannot be said to be any exhaustive definition of collusion in the decided cases. On the one hand, the mere fact that the defendant may desire, and even be anxious for, the divorce is not of itself evidence of collusion, since the plaintiff's right to a decree is not dependent on the whims or desires of the defendant. On the other hand, where the plaintiff has no particular desire for the divorce, but accedes to the defendant's request for one as the price of obtaining financial benefits that she feels she would not otherwise get, the agreement amounts to collusion within the meaning of the cases. A husband, who had been living apart from his wife for some years, and paying her a monthly sum as maintenance for herself and their child, informed her that he could not "do a good job" under such conditions, and that he thought of going to the United States. He offered, however, if she would "give him a divorce", to agree to pay a monthly larger sum, and to maintain two policies of life insurance in favour of her and the child. The wife at first refused, because she disapproved of divorce, but later agreed. The husband thereupon informed his solicitors of acts of adultery on his part, intending that the information should be conveyed to the wife's solicitors, and an action for divorce was launched.

Held, the action must fail on the ground of collusion. It was clear on the evidence that the plaintiff had no particular desire for a divorce, while on the other hand the husband was anxious that one should be granted, and that the action had been brought as part of an agreement that the husband should make a permanent allowance to the wife, who was convinced that his remarriage and settling down in Canada would place her in a more secure financial position than if he went to the United States. Quite apart from considerations of public policy, the Court in these circumstances was deprived of all security in eliciting the truth, and could not pronounce a decree with any confidence in the justice of the case.

Churchward v. Churchward and Holliday, [1895] P. 7; *Hodgins v. Hodgins*, [1942] O.R. 440, applied; *Laidler v. Laidler* (1920), 36 T.L.R. 510, agreed with; *Scott v. Scott*, [1913] P. 52; *Malley v. Malley* (1909), 25 T.L.R. 662; *Wilhelm v. Wilhelm et al.*, [1938] O.R. 93, referred to.

AN ACTION by a wife for divorce. The defendant husband filed a statement of defence, in which he admitted all the allegations in the statement of claim, but disputed the amount claimed for maintenance. He was not represented at the trial.

4th November 1946. The action was tried by McRUER C.J. H.C. without a jury at Toronto.

G. L. Howell, for the plaintiff.

15th November 1946. McRUER C.J.H.C.:—This is an action brought for the dissolution of the marriage between the plaintiff and the defendant spouse (hereinafter referred to as the husband) on the ground of adultery alleged to have been committed with his co-defendant on the 29th and 30th December 1945. The plaintiff also claims custody of an infant child and maintenance for herself and the child.

The plaintiff and her husband were married in June 1930 and lived together until the year 1941, when they separated, and since that time they have lived apart. Prior to the institution of this action the husband had been paying the plaintiff \$115 per month support for herself and their child.

The plaintiff stated in evidence that in December 1945 her husband told her that he could not "do a good job" in his employment under the circumstances under which he was living and that he would not be living with the plaintiff and that he would go away to the United States. He said that if the plaintiff would give him a divorce he would pay her \$130 per month as an allowance for her and the child and maintain a \$10,000 life insurance policy payable to her in case of death, and a \$5,000 policy payable to the child. The plaintiff says that she did not agree to this proposition at first, as she did not believe in divorce. She says that after talking it over with her relatives she finally agreed and so advised her husband. She gives as her reason that she was anxious to have security. The husband was called as a witness for the plaintiff, and gave the only evidence of adultery adduced at the trial. He said that he had known his co-defendant for more than four and one-half years and that he was in love with her and had often committed adultery with her. He swore specifically that he had committed adultery with her on the dates alleged in the statement of claim, namely, 29th and 30th December 1945. The husband tells substantially the same story as the plaintiff about the arrangements that were made between them prior to the institution of these proceedings. He says he wanted to have a divorce as he was anxious to "rehabilitate himself", and that he could not meet his responsibilities to the plaintiff living under the conditions under which he was living. He says that after his wife accepted the proposition made in December 1945, he advised his solicitors of the fact of the adultery committed 29th and 30th December, with the intention that they should communicate the information to the solicitors for the plaintiff. This was obviously to give information to found this action.

I think it is clear on the evidence that the plaintiff has no particular desire for a divorce, while on the other hand, the husband is extremely anxious that one should be granted. It is also clear that this action has been brought as part of an agreement that the husband should make a permanent financial

allowance to the plaintiff and that the plaintiff has been convinced that if her husband is divorced from her and in a position to marry the co-defendant and settle down to his employment in Canada she will be in a more secure financial position than if he should go out of the country as he had threatened to do. While there is no corroboration of the husband's evidence in regard to the adultery, were it necessary to do so I would be disposed to find as a fact that the husband is telling the truth. I however consider that the action must fail on the ground of collusion.

What amounts to collusion in a case of this sort has been exhaustively discussed not only in our own courts but in the courts of England, and after considering the relevant cases I have come to the conclusion that the law as laid down in *Churchward v. Churchward and Holliday*, [1895] P. 7, is the basic law to be applied to this case. It was suggested in *Wilhelm v. Wilhelm et al.*, [1938] O.R. 93, [1938] 2 D.L.R. 222, that the authority of this case has been considerably departed from, but in view of the decision of the majority of the Court of Appeal in *Hodgins v. Hodgins*, [1942] O.R. 440, [1942] 3 D.L.R. 494, I must take it that it is still a decisive authority to be applied where the facts warrant it.

In considering such a case as this there are some fundamental principles to be kept in mind, one of which is clearly stated by McTague J.A. in *Hodgins v. Hodgins*, *supra*:

"It must be remembered that the Court has rights and that in every divorce case there is involved a public interest going to the very basis of national life. In the public interest the Court has not only a right but a duty to erect reasonable safeguards and impose its own discipline."

I quote a similar statement from the judgment of the learned President in *Churchward v. Churchward and Holliday*, *supra*, at p. 30:

"It must always be remembered that, on grounds of public policy, second, perhaps, to none in importance, the marriage status cannot, however much the parties to it may otherwise desire, be altered, except on the fulfilment of certain conditions prescribed by law, conditions which relate to the conduct not only of the person against whom, but of the person by whom, relief is sought."

I do not think it can be said with certainty that there is any exhaustive definition of collusion. On the one hand, the mere fact that the defendant may desire and even be anxious for the divorce is not of itself evidence of collusion. The right of the plaintiff to the decree is not dependent on whims or desires of the defendant. On the other hand, where the plaintiff has no particular desire for the divorce but accedes to the defendant's request for a decree as the price of obtaining financial benefits that she feels would not otherwise be obtained, it is in my view collusion within the meaning of the cases. After a careful review of all the authorities, the learned President in *Churchward v. Churchward and Holliday* states, at p. 30:

"On the whole, it appears to me that the authority of the House of Lords, as shewn by its practice, and of Sir Cresswell Cresswell, as well as of Byles and Wightman, JJ., is decidedly in favour of the position that, if the initiation of a suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion, although no one can put his finger on any fact falsely dealt with, or withheld; and I do not think that the authority of Lord Stowell, Dr. Lushington, Lord Penzance, or, though no doubt this is less clear, of Lord Hannen, can be invoked in favour of a contrary opinion."

In the case at bar, the plaintiff appears before the Court in the character of an injured wife seeking relief against an unfaithful husband, when in fact that is an assumed character. Her real character is one who brings an action for a divorce which she does not want and does not believe in, in order to carry out her part of an agreement which she has made with her husband, who desires to be free from the marriage tie, all being part of a bargain brought about by the male defendant first threatening to leave the country and then agreeing that he will increase the allowance to the plaintiff if she will bring the action. Leaving out of consideration all questions of public policy which are involved in such an agreement where the parties are acting in such concert, the Court is deprived of all security in eliciting the truth and could not pronounce a decree with any confidence in the justice of the case. I quote again from the judgment in *Churchward v. Churchward and Holliday*, at p. 32:

" . . . I must say that a divorce suit ought not in my judgment, to be made the stipulated price of any pecuniary consideration."

I have read with care the judgments in *Scott v. Scott*, [1913] P. 52; *Malley v. Malley* (1909), 25 T.L.R. 662; and *Wilhelm v. Wilhelm et al.*, *supra*, and I cannot find anything in these cases that would warrant me in coming to a conclusion that what was done as shown in the evidence in this case did not amount to collusion in law. It may be that this conclusion may appear to work some hardship on the plaintiff, but I am concerned only with the administration of justice. I fully adopt the language of McCardie J. in *Laidler v. Laidler* (1920), 36 T.L.R. 510:

"The doctrine of collusion is of grave importance to the administration of the law of divorce. The matrimonial relationship is the basis of national life. A rigorous law attends the formalities of that relationship. A strict and rigorous code safeguards the circumstances of its dissolution. Divorce by mutual consent is remote from the contemplation of English law. The marriage tie can only be dissolved under conditions laid down by Act of Parliament."

And at p. 511, the same learned judge says: "It is however now clear that collusion may exist not only when a false case is presented to the Court, but that it is equally possible even in a good case; although, as has been rightly pointed out, it is less frequently practised in a good case because the temptation is lacking. (See Bishop on Marriage and Divorce (1881), section 28). All conduct which disturbs the course of justice falls within the general idea of fraud on the Court and contempt of Court."

To lend the judicial process of the Court to facilitate the agreement made between the parties in this case would, in my opinion, be improper and contrary to the public interest. I will therefore dismiss the action, and regret that while doing so I am unable to award costs against the male defendant.

Action dismissed without costs.

Solicitors for the plaintiff: Hooper & Howell, Toronto.

Solicitors for the defendants: Parkinson, Gardiner & Willis, Toronto.

[LEBEL J.]

The Township of Cornwall v. McNairn et al.

Municipal Corporations—Gifts of Land to Municipalities for Particular Purposes—Sufficiency of Evidence of Dedication and Acceptance—"Common"—The Surveys Act, R.S.O. 1937, c. 232, s. 12(2).

A municipality is entitled to sue for a declaration that particular lands have been dedicated to public use, and that the defendants have no right, title or interest in them. *La Ville de St. Jean v. Molleur et al.* (1908), 40 S.C.R. 629; *The Town of Guelph v. The Canada Company* (1853), 4 Gr. 632, applied.

A dedication of land as "an historical site and public park" is not a laying-out as a "common" within the meaning of s. 12(2) of The Surveys Act, *Re Lorne Park* (1913), 30 O.L.R. 289, 18 D.L.R. 595; *Municipal Council of Sydney et al. v. Attorney-General for New South Wales et al.*, [1894] A.C. 444, applied.

The question whether there has been a dedication of lands for public purposes is one of fact, and to establish such a dedication two things must be proved: (1) an intention on the part of the owner to dedicate; and (2) an acceptance by the public. *Bailey et al. v. The City of Victoria et al.* (1920), 60 S.C.R. 38, applied. On the evidence here, held, while the evidence would justify a finding of an intention to dedicate on the part of the owner, it did not establish acceptance by the municipality for the purpose intended by the owner, but rather the reverse.

Lands dedicated for the public for a particular purpose must be used for that purpose. A municipality cannot without breach of faith continue to hold lands while applying them to a purpose other than that for which they were conveyed. *In re Peck and The Town of Galt* (1881), 46 U.C.Q.B. 211; *Fisher v. Prowse*; *Cooper v. Walker* (1862), 2 B. & S. 770, and other authorities, referred to.

AN ACTION for a declaration, fully set out in the reasons for judgment.

11th to 13th June 1946. The action was tried by LEBEL J. without a jury at Cornwall.

A. W. Beament, K.C. and *S. E. Fennell, K.C.*, for the plaintiff.

C. W. Robinson and *R. S. Johnston*, for the defendants McNairn, Billington and Hodge.

C. J. McDougall, for the defendant Emard.

J. S. Latchford, for the defendant Mercier.

28th November 1946. LEBEL J.:—This is an action brought by the plaintiff municipality for a declaration that lots numbered 322 and 323 according to a registered plan of a subdivision of the west half of lot 5 in the first concession of the township of Cornwall, known as "Riverview", have been dedicated to the public use, and that the defendants have no right, title or interest in them. That such an action lies seems clear from the decision in *La Ville de St. Jean v. Molleur et al.* (1908), 40 S.C.R. 629 at 643, citing *The Town of Guelph v. The Canada Company*

(1853), 4 Gr. 632; see also *Bailey et al. v. The City of Victoria et al.*, 60 S.C.R. 38, 54 D.L.R. 50, [1920] 1 W.W.R. 917.

In 1929 one Frances Bertha Colquhoun was the owner of the west half of lot 5 and other lands. On 20th August of that year, it is alleged, she caused the plan of this Riverview subdivision to be registered. On this plan are shown a number of streets and building lots including lots 322 and 323.

Miss Colquhoun died on 20th May 1930, *i.e.*, within a year of the registration of the plan, and her executor, William Hodge, survived her less than a month. His executors, by deed dated 2nd August 1930, conveyed to the defendants McNairn, Billington and Hodge, the west half of lot 5, saving and excepting, besides other parcels, lots 322 and 323 on the Riverview plan. The said three defendants are the residuary legatees named in the will of Miss Colquhoun, and in the conveyance to them these two lots were said to have been conveyed by Frances Bertha Colquhoun to the Township of Cornwall "as a park", which was not an accurate recital, as will afterwards appear.

At the time of the registration of the plan there stood upon the lots, 322 and 323, an old circular stone windmill, which it was said in argument had been used for military purposes in the war of 1812. From pictures of the structure put in evidence it might well have been used as a blockhouse at that time and later in the rebellion of 1837 and, perhaps, during the Fenian raids of 1876. It was about 150 years old and was regarded as an historical landmark for many years. The people of Cornwall and the vicinity referred to it sometimes as the "Windmill Fort", at other times as the "Old Fort".

The conveyance of lots 322 and 323 from Miss Colquhoun to the plaintiff Township, made mention of in the deed to the defendants McNairn, Billington and Hodge, was never registered. The evidence indicates that the document was prepared and that Miss Colquhoun probably executed it, but that it was subsequently lost.

Secondary evidence of its contents was given by the solicitor who drew it. He produced a memorandum which he said was in Miss Colquhoun's handwriting and contained her instructions; it reads:

"Windmill Fort and Lots 322 and 323—Donated by Miss Bertha Colquhoun to the Township of Cornwall to be permanently maintained by the said Township as an historic site

and public park—In the event of the premises hereto not being kept in reasonable repair same will revert to the Donor or her legal representatives.”

The question whether or not the words commencing “In the event of” and ending with the word “representatives” were included in the missing conveyance will probably never be known for certain, and if the point were important I would be inclined to find that they were not. But the words in the memorandum appearing before the words “In the event of” are to be found written in the margin of the plan itself. They were probably printed in by the surveyor with the memorandum, or a copy of it, or perhaps the conveyance itself, before him, because the wording in the margin of the plan is identical with that of the memorandum down to and including the words “public park”. This marginal notation is relied upon strongly by the plaintiff. In my opinion the plan should not have been registered, because it was never signed by the owner, Miss Colquhoun, as was required at the time, and as is still required, by The Registry Act. However, in view of the conclusions I have reached, I do not consider it necessary to delve into what legal effect that factor has in the circumstances of the case. It seems necessary merely to say that upon the evidence any title which the plaintiff Township may have acquired was subject to the two lots being “permanently maintained by the said Township as an historic site and public park”. This I took to be common ground upon the argument before me.

In the year 1944 the municipality caused the old fort to be torn down and nothing of it now stands. It was stated in evidence by the reeve of the municipality that the building had been demolished in order that the two lots might be converted into a children’s playground. He explained that it was not so converted because of the impossibility of acquiring swings and other necessary apparatus in wartime.

On 13th February 1945 the defendant Mrs. McNairn gave notice to the plaintiff’s council that she and the other “heirs-at-law” (meaning Mrs. Billington and Mrs. Hodge) proposed to offer lots 322 and 323 for sale. In the concluding paragraph of her notice, she said:

“That due to the fact that the Old Fort has been demolished, there is now no longer any reason for the said lands being kept in reserve as an Historical Site, and the heirs-at-law of the said

Frances Bertha Colquhoun propose selling said lots, as building lots."

Pursuant to the intent expressed in the notice just mentioned, the defendants McNairn, Billington and Hodge, by deed dated 17th May 1945, conveyed the two lots to the defendant Mercier, who by deed dated 5th June 1945, granted them to the defendant Emard. Valuable consideration was paid in each instance, the first sale being for \$3,000 and the second for \$3,600. In third party proceedings in the action, the executor of the estate of Mercier, who died following the institution of the action, claims indemnity over against the defendants McNairn, Billington and Hodge in the event that the plaintiff is successful in securing the declaratory judgment sought, and the defendant Emard claims indemnity over in such event from the estate of the deceased Mercier. The defendants McNairn, Billington and Hodge set up a defence in their pleadings to the claim over by the executor of the deceased Mercier, but it was abandoned at trial. The said executor confined his defence to the claim over by the defendant Emard to an allegation that the damages claimed were excessive.

The main point taken by counsel for the different defendants was that if the evidence proved a dedication, the two lots were never maintained by the municipality as an historic site and public park; that on the contrary the municipality had, by demolishing the "Old Fort", utterly deprived the property of its value as an historic site, and that for that reason, as well as others to be mentioned, there was no acceptance of the two lots by the municipality for the purpose for which they had been dedicated. Counsel for the municipality contended that the evidence established such an acceptance, but that in any event no acceptance by the plaintiff for the public was necessary in view of s. 12(2) of The Surveys Act, R.S.O. 1937, c. 232.

Before going into the evidence upon the question of acceptance by the municipality, it is convenient first to deal with s. 12(2) of The Surveys Act. It reads:

"(2) Subject to the provisions of *The Registry Act* and *The Land Titles Act*, as to the amendment or alteration of plans, all allowances for roads, streets, lanes or commons, surveyed in any such city, town, village, lot, mining claim, mining location or any parcel or tract of land or any part thereof, which has been or may be surveyed and laid out by companies or individuals

and laid down on the plans thereof shall be public highways, streets, lanes and commons.”

If s. 12 of The Surveys Act applies in the circumstances here—and I do not think it does—it could apply only to an allowance for a common so laid out on the plan, and any interested person, such as a prospective purchaser of property in this subdivision, who relied solely upon the wording of the marginal notation as sufficient to indicate such a laying-out would, in my opinion, be assuming altogether too much. The words in the margin of the plan mean just what they say, and say very plainly, and I am satisfied their meaning cannot be extended to include a common.

In *Re Lorne Park* (1913), 30 O.L.R. 289 at 294, 18 D.L.R. 595, Middleton J. (as he then was) quoted Lord Hobhouse in *Municipal Council of Sydney et al. v. Attorney-General for New South Wales et al.*, [1894] A.C. 444 at 453 and 454, as follows:

“The word ‘common,’ it is true, has a technical meaning in England and in New South Wales; though what kind of enjoyment it may indicate, and for what persons, cannot be understood without something more. Standing alone it is an ambiguous term which requires explanation, and which may be explained by circumstances. But further, it is very often used, though inexactly and in popular parlance, to denote land devoted to the enjoyment of the public or of large numbers of people. And the question is whether it has not been so used in this instance.”

It seems clear, therefore, that the meaning of the word “common” is to be gathered in the light of the circumstances of the particular case. Therefore, the first question to be decided in the case at bar is whether or not lots 322 and 323 are “lands devoted to the enjoyment of the public” or lands devoted to something altogether different, which different purpose may, as an incident, include an enjoyment by the public.

Lands dedicated for use of the public as “an historical site and public park”—the omission of the indefinite article “a” before “public” is rather significant—are not lands devoted merely to the enjoyment of the public, in my opinion. They are not lands which, having been dedicated for public use, might be used for example as a recreational ground, as a park, as a square or as some other kind of community centre. On the contrary, they were dedicated or donated having regard prima-

rily to the existence of the old fort, as an historical site and public park to be maintained as such by the municipality. The lots in question are not an allowance laid down as a "common" upon the plan of the Riverview subdivision, and, in my opinion, therefore, s. 12(2) of The Surveys Act is of no application in the circumstances.

The question whether there has been a dedication in law is a question of fact, and in order to establish such a dedication two things must be proved: (1) an intention to dedicate on the part of the owner; and (2) an acceptance by the public. See *Bailey et al. v. The City of Victoria et al.*, *supra*, and the cases cited in 5 C.E.D. (Ont.), p. 495, note (y).

The plaintiff municipality endeavoured to establish acceptance by it of the two lots for the public, and urged that an inference to this effect should be drawn from certain factors appearing in the evidence. It sought to prove that the lots were not assessed for taxes for a number of years following the registration of the plan, but it failed to do so. The books and records of the municipality and the assessment notices put in evidence were in such condition as to make it impossible so to find. I am of the opinion that the lots were assessed for taxes in the name of Miss Colquhoun and her heirs after the registration of the plan, but, in any event, the municipality has failed to discharge the onus of proving that the defendants were not assessed.

The municipality also sought to demonstrate an expenditure of public moneys on the property in question, but the sums paid out were trifling and were expended for the purpose of making minor repairs necessitated by the fact that the municipality had failed to keep the old fort in reasonable repair. Moreover, they were made in response to protests from various people who complained that the old fort had been allowed to become a nuisance, which, upon the evidence, I find it had come to be. The small sums paid out were not, in my opinion, such sums as would have been necessary from time to time to keep the property in such repair as must have been contemplated by Miss Colquhoun. Anything expended was for the purpose of alleviating the nuisance rather than to evidence an acceptance of the property.

On one occasion the municipality paid \$22.50 to defray the out-of-pocket expenses of a boy who met with an accident in the old fort, and it was contended by the municipality that this

was evidence of an acceptance of the property. But if the municipality had sought to be relieved from liability on the ground that it had never accepted the lands, it would have had to pay a greater sum in costs in order to defend successfully an action brought to recover damages. Such evidence, in my opinion, proves nothing from the standpoint of an acceptance of the lands.

It was said that approval of the plan by the municipality was indicated by other words which appeared in the margin of the plan, and that this was evidence of acceptance of the lands dedicated. However, the approval was clearly for the purpose of permitting registration of the plan as is required by what is now s. 83(15) of The Registry Act, R.S.O. 1937, c. 170. Such approval is not sufficient to indicate acceptance by the municipality of lands dedicated to it, but in any case there is nothing to point to the fact that the words evidencing the dedication by Miss Colquhoun were on the plan at the time it was approved by the municipality. When they were put on, and by whom, no one knows for certain.

The evidence against an acceptance by the municipality seems to be particularly strong. At the very beginning the reeve of the municipality refused to accept delivery of the conveyance when it was tendered to him by Miss Colquhoun's solicitor, for the reason that it had not been registered at her expense, and the document later became lost. The incident serves to demonstrate what value the municipality placed upon the purported dedication. At no time did the municipality ever level the ground, or fence it, or erect a suitable sign, or do anything, in fact, to indicate that the property was an historical site and public park. No by-law or resolution was ever enacted or passed to evidence an acceptance of the property. In the case of other lands donated by another person for use as a park, the municipality passed such a by-law. Furthermore, no record of the lands in question being a public park was kept as is required by The Municipal Act, R.S.O. 1937, c. 266, s. 425(16).

I find upon the evidence that there never was an acceptance by the municipality for the use of the public, and hence that there was no dedication, of lots 322 and 323. Moreover, I find that there was an actual rejection by the municipality of the property for the purpose for which it was dedicated, commencing with the refusal to accept delivery of the conveyance from Miss

Colquhoun and culminating with the municipality's action in destroying the old fort after deciding to convert the property into a children's playground. How it could be said that there ever was a dedication in law in these circumstances is beyond me.

Lands must be used for the purpose for which they are dedicated: see *In re Peck and The Town of Galt* (1881), 46 U.C.Q.B. 211. A municipality cannot without breach of faith continue to hold lands while applying them to a purpose other than that for which they were transferred: see *per* Duff J. (as he then was) in *Bailey et al. v. The City of Victoria et al.*, *supra*, at p. 54; see also 16 Halsbury, 2nd ed. 1935, p. 187, s. 216, and *Fisher v. Prowse*; *Cooper v. Walker* (1862), 2 B. & S. 770, 121 E.R. 1258.

In the result the action is dismissed with costs, including the costs of the third parties.

Action dismissed with costs.

Solicitors for the plaintiff: Davis & Fennell, Cornwall.

Solicitor for the defendants McNairn, Billington and Hodge: R. S. Johnston, Hamilton.

Solicitor for the defendant Emard: C. J. McDougall, Cornwall.

Solicitors for the defendant Mercier: Chevrier & Latchford, Cornwall.

[LEBEL J.]

Rex v. Gordon.

Motor Vehicles — Evidence — Compulsory Reports and Statements to Police Officers — Extent of Privilege against Subsequent Use as Evidence — The Highway Traffic Act, R.S.O. 1937, c. 288, s. 94, as amended by 1938, c. 17, s. 20.

The privilege of s. 94(5) of The Highway Traffic Act, as amended, which provides that "Any written reports or statements made or furnished under this section shall be without prejudice . . . and no such reports or statements, or any parts thereof or statement contained therein, shall be admissible in evidence for any other purpose in any trial arising out of a motor vehicle accident", extends to oral as well as written statements made under the section. *R. v. Walker*, [1938] O.R. 636, affirmed [1939] S.C.R. 214, discussed. But it extends only to reports or statements "under this section", i.e., to such as a person makes under the compulsion of the earlier part of s. 94. Admissions made to a police officer, apart from s. 94, are admissible in evidence against that person if they are voluntary in the sense that they have not been induced by any threat or promise, and a person who having made such a statement, seeks to have it excluded from evidence must either show that it was not voluntary in that sense or establish that it was made in the discharge of the statutory duty imposed on him by s. 94. He can do this, for example, by showing that the admissions were made to a police constable on an occasion when he had gone to report an accident, or, alternatively, that he claimed privilege before answering any questions put to him by the officer. In the absence of evidence to this effect, evidence of statements made to the police officer is admissible.

AN APPEAL by way of stated case from a conviction by a magistrate.

20th September 1946. The appeal was heard by LEBEL J. in chambers at Toronto.

Mannie Brown, for the accused, appellant.

C. R. Magone, K.C. for the informant, respondent.

16th November 1946. LEBEL J.:—This is an appeal by way of stated case from a conviction registered by Magistrate K. M. Langdon at Georgetown, for that the appellant, "on the 31st day of May 1946, in the Township of Esquesing in the County of Halton, unlawfully did drive a motor vehicle bearing Ontario License #10447-C on #25 Highway without due care and attention or without reasonable consideration for other persons using the road; contrary to Section 27 Sub-section (1) of The Highway Traffic Act" (R.S.O. 1937, c. 288, s. 27 as re-enacted by 1939 c. 20, s. 6, and amended by 1941, c. 22, s. 6.)

The material part of the stated case as submitted reads as follows:

"The only evidence before me consisted of that of the complainant, one, Ray Mason, a police officer, who admitted that his

evidence was based upon the statements and information supplied to him by the accused at the scene of the alleged offence. It was shown by the said evidence, if admissible, (a) that the accused stated to the police officer 'that his windshield wiper wasn't working at the time of the accident', (b) that the accused stated to the police officer the distances and directions travelled by the vehicle.

"Counsel for the accused objected to the said evidence being admitted on the ground that the same consisted of reports or statements, or parts thereof or statements contained in information furnished by the accused to the police officer, in pursuance of a statutory duty to do so, imposed by The Highway Traffic Act, and which were not admissible in evidence in this proceeding, by reason of the provisions of Section 94(5) of the said Highway Traffic Act.

"Counsel for the said Gordon Dean desires to question the validity of the said conviction on the ground that it is erroneous in point of law, the question submitted for the Judgment of this Honourable Court being:

"1. Whether I was right in admitting as evidence against the accused statements or information (not in writing) or parts thereof, or statements contained therein, made or furnished by the accused to the said Ray Mason, a police officer, on the 31st day of May, 1946, having regard to the provisions of Section 94(5) of The Highway Traffic Act, being R.S.O. 1937, c. 288?"

It should be observed at the outset that the offence of which the appellant was convicted is one under The Highway Traffic Act and not under The Criminal Code, R.S.C. 1927, c. 36. It should also be noted that no objection appears to have been taken to the admissibility in evidence of the appellant's oral statements to the police officer on the ground that they were involuntary in the sense that they were made by reason of fear of prejudice or hope of advantage held out by a person in authority, and it must be assumed that no such objection lay.

Subs. 1 and 5 (as amended by 1938, c. 17, s. 20) of s. 94 of The Highway Traffic Act, read as follows:

"(1) Every person in charge of a motor vehicle who is directly or indirectly involved in an accident shall, if the accident results in personal injuries, or in damage to property apparently exceeding \$50, report such accident forthwith to the nearest provincial or municipal police officer, and furnish him with such

information or written statement concerning the accident as may be required by the officer or by the Registrar.”

“(5) Any written reports or statements made or furnished under this section shall be without prejudice, shall be for the information of the Registrar, and shall not be open to public inspection, and the fact that such reports and statements have been so made or furnished shall be admissible in evidence solely to prove compliance with this section, and no such reports or statements, or any parts thereof or statement contained therein, shall be admissible in evidence for any other purpose in any trial arising out of a motor vehicle accident.”

Since subs. 1 requires a person in charge of a motor vehicle in certain circumstances to report an accident forthwith to the nearest provincial or municipal police officer and furnish him with information concerning the accident, counsel for the appellant advanced the argument that the common law rights of the subject are not to be considered as taken away or affected by a statute unless the intention to do so is expressed in clear language, and he urged for this reason that s. 94 must be strictly construed. While this may well be true, in *Walker v. The King*, [1939] S.C.R. 214 at 217, [1939] 2 D.L.R. 353, 71 C.C.C. 305, Chief Justice Duff said:

“But there is no rule of law that statements made by an accused under compulsion of statute are, because of such compulsion alone, inadmissible against him in criminal proceedings. Generally speaking, such statements are admissible unless they fall within the scope of some specific enactment or rule excluding them (*Reg. v. Scott* (1856), Dears. & B. 47, 169 E.R. 909; *Reg. v. Coote* (1873), L.R. 4 P.C. 599 at 607).”

It is obvious, therefore, that this appeal falls to be decided upon the construction or interpretation of the specific enactment with which the Court is now concerned, *viz.*, subs. 5, which must, it seems to me, be scrutinized in such light as all the subsections of s. 94 afford.

Counsel for the appellant contended that the words “written reports or statements made or furnished”, appearing in the first line of subs. 5, should be taken to read “written reports made or statements furnished”, in other words, that the privilege embraces oral as well as written reports or statements; and he also contended that, since the evidence showed that the oral statements were made by a person involved in an accident to a police

officer, they were privileged *prima facie*, and should not have been admitted. Counsel for the Crown took the position that the privilege was not meant to extend to oral statements made to a police officer which were otherwise admissible, but that, in any event, there was no *prima facie* privilege.

The point was raised in Ontario in the case of *Rex v. Walker*, [1938] O.R. 636, [1938] 3 D.L.R. 516, 70 C.C.C. 238, which was carried to the Supreme Court of Canada (see *Walker v. The King*, *supra*) but neither Court found it necessary to decide it expressly. So far as I have been able to determine, no other reported case deals with the question.

In construing a statute it is always helpful to attempt to determine the object or purpose of the enactment. In *Walker v. The King*, *supra*, Chief Justice Duff, at p. 220, said:

"The primary purpose of section 88 [now s. 94] is, manifestly, to make provision for procuring information for record with the Registrar which may be useful for statistical and rating purposes, and other purposes of general public interest in relation to motor traffic. Subsection 5 is aimed, no doubt, at silencing the apprehensions of people from whom such information must be obtained."

To achieve this purpose the Legislature has by s. 94(1) imposed a specific duty upon every person involved in an accident to report the accident in certain circumstances to the nearest police officer, and to furnish him with such information or written statement as may be required. Subs. 3 goes on to indicate that the police officer receiving such report does so in order to enable him to complete a written report to the Registrar, *viz.*, the Registrar of Motor Vehicles. By subs. 4 the Registrar may require additional information and supplementary reports from the person involved in the accident and others "to complete his records, and to establish, as far as possible, the causes of the accident, the persons responsible, and the extent of the personal injuries and property damage, if any, resulting therefrom". If a person under the duty imposed by s. 94 fails to report or furnish any information or written statement required, he is by subs. 6 liable to a fine and other penalties.

It seems clear that the report completed by the police officer for the information of the Registrar is such a written report as is privileged under subs. 5 in any trial arising out of a motor vehicle accident, but it seems equally clear that it is not the only

privileged report contemplated by the Legislature, otherwise one would expect it to have been so stated.

Chief Justice Duff in the *Walker* case, at p. 218, said:

"I do not disagree with the view that, in point of grammatical construction, the preferable reading of subsection 5 would be that it applies only to statements in writing; but grammatical considerations are not necessarily conclusive. If section 88 [now s. 94] were to be considered by itself and apart from the enactments I am about to discuss, a good deal might be said for the view that the adjective 'written' qualifies the word 'reports' only, and that, consequently, oral as well as written statements are within the privilege created by subsection 5."

If the privilege is confined to written reports or statements, as the Crown contends, some rather startling results would ensue. For instance, is the person who is bound to report privileged if he writes a letter or a series of letters to the nearest police constable, but not if he gives him the same information orally? If the person furnishes part of the information in writing in the presence of the officer and then adds some particulars orally, is he privileged only as to what he has written? Then again, when subs. 5 speaks of "written reports or statements made or furnished", is one to understand that the report completed by the officer for the Registrar's purposes is privileged, whereas the oral information on which such report is usually based is not? If the police officer secures information orally from the person, but neglects to put it in writing, or deliberately refrains from so doing, does this make such information admissible in evidence against the person? These questions serve to emphasize the difficulty and, indeed, the absurdity of such an interpretation.

Manifestly, at the time of the enactment of s. 94 there were at least some motor car accidents which had escaped the attention of the police and of the Registrar, with the result that statistical and other accident records were incomplete. The word "report" in subs. 1 connotes in its context "to carry, convey or repeat something to another" (see *The Oxford English Dictionary*, vol. 8, p. 474). In my view the word is used in the sense that a person involved in a motor accident is required to convey the necessary information without solicitation and without delay; he is not to await a visit from the nearest police officer but must seek him out. When he has the officer's ear, he

must be prepared to answer such questions and furnish such written statement as may be required, and, in my opinion, when the person acts in the discharge of this statutory duty, any information he furnishes the officer, whether it be given orally or in writing, is absolutely privileged. Therefore, the word "written" in subs. 5 qualifies only the word "reports"; consequently, the privilege embraces oral as well as written reports or statements.

While I have rejected the narrow construction of the privilege under s. 94 urged upon me by the Crown, it does not follow that I subscribe to the view expressed by counsel for the appellant, namely, that words spoken to the police officer following an accident are *prima facie* privileged under subs. 5.

I see nothing inconsistent in the coexistence of a duty imposed upon a person to report the particulars of an accident without solicitation and the age-old duty of a police officer to investigate the circumstances and to interrogate persons in the process. It would be strange indeed to find that the Legislature had, in the imposition of a new duty upon a person involved in an accident, found it necessary to curtail or render ineffectual the totally unrelated and long-existing duty upon a police officer to interrogate. By so doing, the Legislature would have overthrown fundamental principles and departed from our general system of law enforcement.

As stated in Maxwell on The Interpretation of Statutes, 8th ed. 1937, pp. 73-4:

"It is not infrequently necessary, therefore, to limit the effect of the words contained in an enactment (especially general words), and sometimes to depart, not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their wide primary or grammatical meaning actually express the real intention of the Legislature

"It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual, or their natural sense, would be to give them a meaning other than that which was actually intended. General words and

phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act. The general words of the Act are not to be so construed as to alter the previous policy of the law."

So long as the admissions to the officer are voluntary in the sense that they have not been induced by any threat, and due warning has been given by the officer where necessary, they are admissible, unless, of course, the person who made them can show that they were made in the discharge of the statutory duty imposed upon him by s. 94. Such person would have no difficulty in establishing privilege at any trial arising out of a motor vehicle accident if he showed, for example, that the admissions were made to the police constable on an occasion when he had gone to report the circumstances of an accident or, alternatively, that when the officer arrived at the scene of the accident or visited him afterwards, he had claimed privilege under s. 94 before answering any questions put to him by the officer. Until the officer gave him that protection, he would not be bound to answer any questions. As I have stated, it is only reports or statements made or furnished "*under this section*", viz., s. 94, that are privileged, and in the absence of evidence to show that the occasion was privileged, evidence of statements or reports made to the police officer is admissible. The stated case as submitted makes no mention of evidence going to establish that the words spoken by the appellant to the police officer were uttered on a privileged occasion.

In the result the magistrate was right in admitting the disputed evidence, and the answer to the question put by him is "yes".

During the course of the argument before me, counsel for the appellant referred me to a passage appearing in O'Connor's Highway Traffic Act, 4th ed. 1942, p. 216, from which it appears that the late Chief Justice of the High Court of this Province in an unreported case, *Goodbarne v. Farrell et al.*, tried in Hamilton on 16th May 1939, in commenting upon s. 94(5) and upon *Walker v. The King*, *supra*, said:

"The Court did not actually have to determine whether the word 'written' qualified both of these words 'reports' and 'statements' and I do not think the Chief Justice was really passing on that. My opinion is not very strong but I think I have pro-

ceeded upon the grammatical construction in other cases, and have said that unless the statement was a written statement, the Ontario statute did not exclude it."

But I have since writing my reasons in this case been referred to another unreported decision of the late Chief Justice of the High Court, *Cameron et al. v. MacKay et al.*, tried in Toronto on 17th October 1940, for which I am indebted to the learned editors of the Ontario Reports and of the 4th edition of O'Connor's Highway Traffic Act. From a perusal of a transcript of a later ruling given upon the admissibility of certain oral statements made to a police officer, it would appear that the learned Chief Justice of the High Court completely changed his earlier view, because he is reported to have said in the latter case:

"The Chief Justice of Canada, in the case of *Walker v. The King*, [*supra*], while not disagreeing with the view that in point of grammatical construction the preferable reading of s. 94(5) would be that it applies only to statements in writing, says that grammatical considerations are not necessarily conclusive, and that a good deal is to be said for the view that oral as well as written statements are within the privilege created by the subsection. In the view that the Court took of the particular statements that had to be considered in *Walker's* case, it was unnecessary to pronounce definitely upon the point upon which a pronouncement is to be made here, and the Court did not express an opinion as to the particular point, and the Chief Justice, as I have said, left it quite open, as did also Mr. Justice Crocket. There is nothing, then in *Walker's* case to help very greatly in the present discussion, and I am driven to what I think is the reasonable meaning to be attached to the word 'statements' where the word appears in s. 94(5). My conclusion is, as already indicated, that the word means, or includes, in that place 'things said by word of mouth'."

The learned Chief Justice ruled that the things said by word of mouth were inadmissible, but I was interested to note that his ruling is prefaced by these words:

"The officer says that the report called for by s. 94(1) was made and that, having received it, he proceeded, pursuant to s. 94(3), to secure by enquiries such particulars of the accident, the persons involved, the extent of the personal injuries, and so on, as might be necessary for the completion of his written

report to the Registrar, and that in the course of those enquiries he asked the questions the answers to which counsel for the defendants now desires to prove."

It is perfectly clear, therefore, that in *Cameron et al. v. MacKay et al.* a proper foundation was laid for the privilege claimed under s. 94(5). The words spoken to the officer on that occasion were inadmissible, in the opinion of the learned Chief Justice, because the evidence showed they were uttered during the course of an enquiry which the police officer was making for the completion of his report to the Registrar under s. 94.

In view of the unsettled state of the law upon the point as hitherto reported, I make no order as to costs.

Appeal dismissed.

Solicitor for the appellant: Mannie Brown, Toronto.

[COURT OF APPEAL.]

Re Bell.

Evidence—Presumptions—Validity of Marriage—Death.

M.B. was married to T.B. in 1901, and went through a form of marriage with W. in 1917, describing herself as a widow. She died intestate in 1944, and a reference was directed to ascertain who were her next-of-kin. At the time of the reference, T.B. had not been heard of since 1907, although the administrator of M.B.'s estate advertised extensively in all places where it was likely that he would have been heard of. There was some evidence that M.B. had told witnesses, after her marriage to W., that T.B. was still alive, but the referee held that this evidence was insufficient to rebut the presumption that T.B. was dead at the time of M.B.'s marriage to W. The next-of-kin of M.B. appealed.

Held, the referee's findings should be accepted, and, this being the case, it was to be presumed that T.B. was dead at the time of M.B.'s marriage to W., that this second marriage was valid, and that W. was entitled to share in M.B.'s estate. The presumption of a valid marriage, invoked on his behalf, did not rest, in this case, upon the observance of all proper legal formalities, or other facts, such as the long cohabitation of the parties, but wholly upon M.B.'s status at the time. This status in turn depended upon a further presumption of law, *viz.*, that laid down in *In re Phené's Trusts* (1870), L.R. 5 Ch. 139; *Lal Chand Marwari v. Mahant Ramrup Gir et al.* (1925), 42 T.L.R. 159, and subsequent cases, that where a person had not been heard of for at least seven years by those who would naturally have heard of him if he had been alive, he was presumed to be dead, although there was no presumption as to the precise time within the seven years at which his death occurred. T.B. had apparently not been heard of for more than seven years before 1917, and he was therefore to be presumed to have been dead at that time.

AN APPEAL by the next-of-kin of Mary Agnes Bell, deceased, from an order of Barlow J., dismissing an appeal from the report of O. E. Lennox, K.C., Assistant Master, upon a reference to determine who were the persons entitled to share in the estate of the deceased. The reasons of the Assistant Master and Barlow J. were as follows:

9th May 1946. LENNOX, ASSISTANT MASTER:—Mary Agnes Bell died intestate on the 26th April 1944. Upon the application of the administrator, Mr. Justice Urquhart directed a reference to determine who are the persons entitled to share in the distribution of her estate.

The deceased married Thomas Bell in 1901. He is said to have been 24 years of age at the time. Thomas Bell has not been heard of since 1907. On the strength of the evidence, coupled with extensive advertising, both in Toronto, where he made his home and followed his trade as a tailor, in Hamilton, where it is suggested he subsequently made his home, and in Oshawa, the locality in which he was born, there is sufficient ground for presuming that he is dead in order that the estate of Mary Agnes Bell may be distributed.

Mary Bell married Charles L. S. Wright in 1917, describing herself for the purpose of the marriage records as a widow. Wright claims to be entitled to share in the distribution of her estate as her lawful husband. He disclaims having any knowledge concerning Bell at the time, and in advancing his claim relies upon the legal presumption in favour of marriage. Although Wright was not possessed of sufficient evidence to raise the presumption of death, the evidence has been furnished by Mary Bell's collaterals. The case which those disputing Wright's claim have to meet is the same under either presumption, and it seems logical to test the respective rights throughout under a legal presumption which is common to the interests of all concerned. I might say, however, before leaving the question, that in my view the presumption in favour of marriage is properly invoked. The cases relied on do not deal in terms with the matter of the status of parties to marry; but there do not appear to be any grounds for limiting the force of what is described in the leading case of *Piers et al. v. Piers* (1849), 2 H.L. Cas. 331, 9 E.R. 1118, as "a strong legal presumption in favour of marriage". *Ivett v. Ivett* (1930), 143 L.T. 680, and other cases in which one of the parties to the marriage contract contests the validity of the marriage, are readily distinguished and have no application. Then it is clearly a question of fact, not of presumption.

The law as to the presumption of death has not been changed since the rule was laid down in the case of *In re Phené's Trusts* (1870), L.R. 5 Ch. 139. But a revised statement of the rule is to be found in the decision of the Privy Council in *Lal Chand Marwari v. Mahant Ramrup Gir et al.* (1925), 42 T.L.R. 159. It is suggested that the period of absence may be better described as being "of not less than seven years", instead of a period "of seven years", so that the rule may be stated in the following terms:

If a person has not been heard of for a term of not less than seven years, there is a presumption of law that he is dead. But the onus of proving the death of the person at any particular date must rest with the person to whose title that fact is essential.

The onus is placed on those who first invoked the presumption of death to prove that Thomas Bell was alive at the time of or subsequent to the marriage to Wright.

Nothing is known directly regarding the circumstances of Bell's disappearance. It is established beyond reasonable doubt that he has not been seen since 1907. The explanation given by Mary Bell is that he went back to live with an aunt in Hamilton, who had brought him up. If this was the case, it would be reasonable to expect that some trace of him could be found. There is no record of his death in either Wentworth or York county. There is evidence that even as late as 1934 Mary Bell was in the habit of going away at week-ends, and would be away over night. The theory is that she was visiting Bell in Hamilton. About 1921 or 1922 a friend inquired about Bell, and Mary Bell said he was in poor health. Other than this very little is known regarding what Mary Bell knew or thought. She was declared incapable in 1942, and so was probably unable to take anyone into her confidence before she died.

Wright, prior to his marriage, lived for some time in a rooming-house operated by Mary Bell. He enlisted in the army before he married her in 1917, and proceeded overseas the same year. In the meantime, when he was on leave, they lived together as man and wife. When he returned from overseas in 1919, she told him he could not live with her as she was living with another man. The other man was evidently one Pearce, and it appears that he was also a roomer in the Bell establishment prior to the marriage in question. Wright left without protest. It is suggested that his mild acceptance of the facts indicates that he knew that his marriage was bigamous and that he had no other alternative. I am unable to give effect to the mere suggestion. The somewhat unusual circumstances offer a fairly logical explanation of much of Mary Bell's otherwise strange conduct. She never used the name Wright, or mentioned the fact of her second marriage. This is not difficult to understand in view of her relations with Pearce. In time her relations with Pearce, I would judge, became fairly obvious to her family and friends. Although most reticent regarding Bell, she gave the impression that he was alive, which served as an excuse for not marrying Pearce, while the real reason remained in the background.

There is nothing tangible respecting the whereabouts of Thomas Bell. The evidence is in fact nothing more than a theory—a theory which would render Mary Bell guilty of bigamy. I find accordingly that Thomas Bell should be presumed

to be dead; that in the absence of sufficient evidence to the contrary he must be presumed to have been dead prior to 1917, and consequently that Charles L. S. Wright is entitled to share in the distribution of the estate of Mary Agnes Bell, as her lawful husband.

25th June 1946. BARLOW J. [after stating the nature of the appeal]:—No question arises as to the right of certain sisters of the deceased to share in the estate.

The question for determination is the right of Charles L. S. Wright to share in the deceased's estate as the husband of the deceased. The deceased married Thomas Bell in 1901. The deceased, describing herself as a widow, married Charles L. S. Wright in 1917. The questions before the Assistant Master were:

1. Is Thomas Bell presumed to be dead?
2. At what time did he die?

The learned Assistant Master found that Thomas Bell is presumed to be dead, and that in the absence of sufficient evidence to the contrary, he must be presumed to have been dead prior to 1917.

The next-of-kin appeal from the finding that Thomas Bell must be presumed to have been dead prior to 1917. Counsel admit that Thomas Bell was legally married to the deceased in 1901, and that if Thomas Bell was dead prior to 1917, the marriage of Charles L. S. Wright and Mary Agnes Bell was a valid marriage. Counsel for the appellant contends that the onus falls upon Charles L. S. Wright to prove that Thomas Bell died before the 1917 marriage. Counsel for Wright contends that there is a strong legal presumption of a valid marriage between Wright and Mary Agnes Bell and that the onus of displacing this presumption, by showing that Thomas Bell was alive at the time of the 1917 marriage, is upon the next-of-kin who assert it. There is a presumption as to death, and it has been found by the learned Assistant Master that Thomas Bell is presumed to be dead. There is no presumption as to the time of death. This must be proved by evidence. Furthermore there is no presumption of life. There is not sufficient evidence to show when Bell died, nor is there sufficient evidence to show that Bell was alive in 1917.

The law is well settled that there is a strong legal presumption of a valid marriage. It has been shown by a certificate from the Registrar-General's office that Wright and Mary Agnes Bell

were married in 1917, and there is evidence to show that they lived together. This is sufficient to raise the legal presumption of a valid marriage. This presumption can only be displaced by evidence showing that Thomas Bell was alive at the time of the marriage. In my opinion the onus is cast upon the next-of-kin who assert it. There is not sufficient evidence, in fact there is very little evidence, to show that Thomas Bell was alive in 1917. Clearly there is not sufficient evidence to rebut the presumption of a legal marriage.

For reference see: *Piers et al. v. Piers* (1849), 2 H.L. Cas. 331 at 361-2, 9 E.R. 1118; *Robb v. Robb et al.* (1891), 20 O.R. 591 at 597; *O'Connor v. Kennedy* (1887), 15 O.R. 20 at 24-5; *Hedge v. Morrow* (1914), 32 O.L.R. 218 at 231, 20 D.L.R. 561; *The London Life Insurance Company v. Trustee of the Property of The Lang Shirt Company, Limited*, [1929] S.C.R. 117 at 126, [1929] 1 D.L.R. 328, 51 C.C.C. 31; *Re McNeil* (1906), 12 O.L.R. 208; *Darling v. Sun Life Assurance Company of Canada*, [1943] O.R. 26 at 34, [1943] 1 D.L.R. 316, 10 I.L.R. 1.

The appeal will therefore be dismissed with costs out of the estate, those of the administrator as between solicitor and client.

8th October 1943. The appeal was heard by HENDERSON, HOPE and HOGG JJ.A.

W. Judson, for the next-of-kin, appellants: There is evidence that the deceased stated in 1943 that she was still married to Bell, which was long after the purported marriage to Wright.

It is well settled that there is a presumption of death after seven years' absence, but that there is no presumption that the death occurred at any particular time, and that the onus of proving the date of death is on the person who alleges the date: *Darling v. Sun Life Assurance Company of Canada*, [1943] O.R. 26, [1943] 1 D.L.R. 316, 10 I.L.R. 1; *In re Phené's Trusts* (1870), L.R. 5 Ch. 139.

As to the presumption in favour of a valid marriage, relied on by Barlow J., see 4 C.E.D. (Ont.), p. 417. If there is any evidence to rebut the presumption the jury must weigh the evidence without relying upon any presumption. In this case there is conflicting evidence, which must be weighed on its merits.

The presumption is only that the marriage is formally valid; it does not extend to the capacity of the parties to contract a valid marriage: 4 C.E.D. (Ont.), pp. 773-5; *Piers et al. v. Piers* (1849), 2 H.L. Cas. 331, 9 E.R. 1118; *Robb v. Robb et al.* (1891),

20 O.R. 591; *O'Connor v. Kennedy* (1887), 15 O.R. 20; *Hedge v. Morrow* (1914), 32 O.L.R. 218, 20 D.L.R. 561.

A single judge in England appears to have extended the presumption to cover the capacity of parties to marry, in *Tweney v. Tweney*, [1946] P. 180. It is submitted that this extension is unwarranted by the authorities, and in any case there could only be a presumption of capacity to marry until some evidence was given to the contrary, and here there is such evidence.

There is no room here for the operation of any presumption against the commission of a crime, *viz.*, bigamy. Seven years had elapsed, at the time of the marriage to Wright, since Bell had disappeared, and it might well be that the deceased married Wright in good faith, only to learn later that Bell was still alive. In such circumstances she would not be guilty of bigamy, but her marriage to Wright would nevertheless be invalid.

J. J. Robinette, K.C., for Charles L. S. Wright, respondent: We rely upon the presumption of the validity of marriage, and this presumption places on the claimants the onus of showing that Bell was alive at, or after, the time of the marriage to Wright. In addition to the cases cited for the appellants as to this presumption, we refer to 38 Corpus Juris, 1925, p. 1328. The presumption of a valid marriage is a presumption of law and not of fact, and requires the clearest kind of evidence to rebut it. There is no such clear evidence in this case.

R. N. Soward, K.C., for the administrator, submitted his rights to the Court, and referred, as to what the Court might do in the circumstances, to *In re Benjamin; Neville v. Benjamin*, [1902] 1 Ch. 723, and *Hansell v. Spink*, [1943] Ch. 396.

Cur. adv. vult.

3rd December 1946. HENDERSON J.A. agrees with HOGG J.A.

HOPE J.A. concurs in the result.

HOGG J.A.:—This appeal is brought by Margaret Elizabeth MacRae, Hattie McGeoch, Gladys Bumstead and Donald J. McMillan, from an order made by Barlow J. on the 25th June 1946, dismissing an appeal from that part of the report of Mr. O. E. Lennox, K.C., Ass'tant Master, dated the 28th May 1946, made pursuant to an order of Urquhart J. of the 14th February 1946, directing a reference in order to ascertain the next-of-kin of the late Mary Agnes Bell, deceased, in which the learned Assistant Master found "that Charles Louis Schomberg Wright

having married the said Mary Agnes Bell on the 21st day of February, 1917, is her lawful husband and is entitled to share in the distribution of the Estate of the said Mary Agnes Bell."

Mary Agnes Bell died on the 27th April 1944, intestate, The Trusts and Guarantee Company, Limited being appointed the administrators of her estate. Margaret MacRae and Hattie McGeoch, two of the appellants, are sisters, and the other two appellants, Gladys Bumstead and Donald J. McMillan, are a niece and nephew, respectively, of Mary Agnes Bell.

There was evidence taken on the reference which established that Mary Agnes Bell, whose maiden name was Mary Agnes McGeoch, was married on the 4th June 1901 to one Thomas Bell, and there was evidence, also, that a ceremony of marriage was performed between Mary Agnes Bell and Charles Louis Schomberg Wright, the respondent, on the 21st February 1917, at the city of Toronto. The respondent testified, on the reference, that Mary Bell had told him before her marriage to him that she was a widow, and that he spent his week-ends with her for several months after the marriage ceremony, when he then went overseas with the Canadian overseas forces and did not return to Toronto until the year 1919. He then found that Mary Bell was living with a man named Pearce. The respondent did not live with her afterwards, nor did he make any attempt to have her live with him or to assume the relationship of man and wife. Mrs. MacRae testified that she had heard her sister, Mary Bell, some twenty-three years ago, say that Bell was then living. Mrs. Christine MacGillivray testified that she had been a friend of Mary Bell's from childhood and that Mary Bell sometimes visited her at her residence in Meaford. Upon one of these occasions Mary Bell had told her, after a visit to a fortune teller, that she had married and had afterwards heard that Bell was still living and that she, Mrs. Bell, had then gone to the city of Hamilton and found that this was so.

The solution of the problem presented in this case rests upon the answer to the question whether the marriage of Mary Bell to the respondent Wright, in 1917, was a valid marriage. If Bell was alive when his wife went through the ceremony of marriage with Wright in 1917, then, of course, such marriage is void. In order to declare the second marriage valid, Mary Bell must be held to have had, at the time of this marriage, the status of a widow or an unmarried woman, and such status must depend on

whether as a matter of fact, or because of a presumption of law, Bell was considered to be dead before the marriage to Wright took place.

It is true that the law presumes a marriage to be valid, unless or until such presumption is rebutted and such rebuttal is to be by evidence which makes the illegality of the marriage clearly appear. In 16 Halsbury, Laws of England, 2nd ed. 1935, p. 599, reference is made to the presumption as to the validity of a marriage, as follows:

“Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence.”

In the present case, however, the presumption does not rest upon the fact that the proper formalities prescribed by law were observed or because other factors, such as the long cohabitation of the parties, were present, but the validity of the marriage of Mary Bell to Wright rests wholly upon her status at the time such marriage was performed, and this question again depends solely upon the circumstance of whether Bell must be presumed to have been dead at the date of this second marriage. If Bell is to be presumed to have been dead at the time Mary Agnes Bell went through the ceremony of marriage on the 21st February 1917, with Wright, such marriage should be held to be a valid and subsisting one. If, on the other hand, sufficient evidence has been adduced to rebut the presumption of the death of Bell, it could not be held that at the date of Mary Bell's marriage to Wright she had the status of a widow or an unmarried woman, and, as a consequence, this marriage would not be valid.

With respect to the presumption that a person is dead, the rule which governs is laid down in the leading case of *In re Phené's Trusts* (1870), L.R. 5 Ch. 139, where it was said:

“If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption, but of evidence, and the *onus* of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.”

Sir James Stephen, in his *Digest of the Law of Evidence*, 10th ed. 1922, at pp. 115-6, states the rule to be gathered from the *Phen 's Trusts* case and the other cases cited by him to be:

“A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him, is presumed to be dead unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it.”

This definition of the presumption is approved by the judges of the Divorce Division in *Ivett v. Ivett* (1930), 143 L.T. 680, and is quoted by McRuer J.A. (now C.J.H.C.) in *Beattie v. Beattie*, [1945] O.R. 129, [1945] 1 D.L.R. 574. In *Lal Chand Marwari v. Mahant Ramrup Gir et al.* (1925), 42 T.L.R. 159, the Privy Council refers to the rule in the following language:

“Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one ‘of not less than seven years.’ ”

This presumption is also discussed in *Darling v. Sun Life Assurance Company of Canada*, [1943] O.R. 26, [1943] 1 D.L.R. 316, 10 I.L.R. 1.

In *Olsson v. Ancient Order of United Workmen* (1916), 38 O.L.R. 268, Middleton J. was of the opinion that the evidence must show that the person in question “has not been heard from down not only to the bringing of the action but also to the trial”, although the period of seven years with which the presumption is concerned runs from the date when he or she was last known to be alive.

There is no presumption of law as to the continuance of life, although an inference may sometimes be drawn from the particular circumstances of the case that a person alive at a certain time was alive at a later date: *Hedge v. Morrow* (1914), 32 O.L.R. 218, 20 D.L.R. 561.

In *Re Pinsonneault* (1915), 34 O.L.R. 388, 25 D.L.R. 790, Middleton J. referred to 13 Halsbury, *Laws of England*, 1st ed. 1910, p. 500 (see vol. 13, 2nd ed. 1934, p. 630), where the presumption concerning death is referred to in the following terms:

“ . . . if it is proved that for a period of seven years no news of a person has been received by those who would naturally

hear of him if he were alive, and that such inquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead."

Middleton J. furthermore stated, in the same case, that great care is necessary where death is sought to be presumed on the evidence of those who profit by its establishment.

In the present case, the administrators have done whatever was possible for them to do, by advertising and inquiry, to ascertain whether Bell was alive or not at the date of Mary Bell's marriage to Wright, but without success. The appellants would profit if the presumption were rebutted, and the respondent Wright, on the other hand, would profit by the presumption being confirmed.

In *Doe Wheeler v. McWilliams* (1846), 2 U.C.Q.B. 77, Robinson C.J., in discussing the presumption in support of the validity of a marriage, said, at p. 80, that with regard to a presumption of this kind: "The presumption need not be encountered by direct evidence, it is sufficient to shew circumstances that rebut the general probability".

Riddell J. in *Lowry v. Thompson* (1913), 29 O.L.R. 478, 15 D.L.R. 463, said that: "The expression 'until rebutted' [means] . . . 'until evidence is given which is believed and which rebuts the presumption.'"

Both the Assistant Master and Barlow J. were of the opinion that the presumption of the death of Bell could properly be invoked and was not rebutted. It is true that the evidence given in rebuttal of the presumption by certain of the appellants is of little value, and the sole evidence of any weight in rebuttal is that of Mrs. MacGillivray, who is not interested in the result of the proceedings.

The evidence of Mrs. MacGillivray was not accepted by the Assistant Master, who saw and heard this witness, nor was it considered sufficient by Barlow J. to rebut the presumption as to the death of Bell. To accept this testimony would possibly not impute the crime of bigamy to Mary Bell, for, although there is no direct evidence to show that she had reasonable grounds to believe Bell was dead, he apparently had been continuously absent for the seven years preceding the second marriage and it is not proved she knew Bell was alive at any time during those seven years. I do not think this statement of Mrs. MacGillivray, especially when the circumstances leading up to its having been

made are taken into account, is one which is sufficiently direct or of sufficient weight to rebut the presumption, and, furthermore, when it is viewed in the light of the unsuccessful attempts made to obtain any information concerning Bell. Such being the case, Mary Bell had the status of a widow at the date of her marriage to the respondent, and her marriage to him was therefore valid. The appeal should be dismissed and the order of Barlow J. should be affirmed.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Daly, Thistle, Judson & McTaggart, Toronto.

Solicitor for Charles L. S. Wright, respondent: John J. RobINETTE, Toronto.

Solicitors for the administrator: McLaughlin, Macaulay, May and Soward, Toronto.

[WILSON J.]

Re Seperich and Madill.

Real Property—Registration—Notice of Trust affecting Land—Insufficiency of Constructive Notice—Description of Grantee as “Trustee”—Trust Instrument Not Registered — Whether Subsequent Purchaser Affected—The Registry Act, R.S.O. 1937, c. 170, ss. 74, 75.

The fact that a grantee of land is described in the deed as “trustee”, and states in his land transfer tax affidavit that he has not given any consideration, and is to hold the land as trustee, does not constitute actual notice, to a subsequent purchaser, of a trust affecting the land, and if he subsequently conveys the land, again describing himself as “trustee”, his grantee will be able to give a good title free from any trust. The statement in the affidavit, and the non-payment of tax, are not enough to make inapplicable the rule laid down in *Re McKinley and McCullough* (1919), 46 O.L.R. 535. *Re Thompson and Jenkins* (1928), 63 O.L.R. 33, referred to.

The English cases dealing with constructive notice in similar circumstances are inapplicable in Ontario because of the provisions of ss. 74 and 75 of The Registry Act. *Peterkin v. McFarlane* (1884), 9 O.A.R. 429, affirmed *sub nom. Rose et al. v. Peterkin* (1885), 13 S.C.R. 677, referred to.

A MOTION by a purchaser, under The Vendors and Purchasers Act, R.S.O. 1937, c. 168, for an order that an objection to title had not been satisfactorily answered, and constituted a valid objection.

21st November 1946. The motion was heard by WILSON J. in Weekly Court at Toronto.

R. M. Willes Chitty, K.C., for the purchaser, applicant.

E. Clement, for the vendor.

4th December 1946. WILSON J.:—This is a motion on behalf of the purchaser for an order declaring that the following objection to title has not been satisfactorily answered and that it constitutes a valid objection to the title and/or for such other and further order as may seem just, namely:

“(8) Instrument No. 41899 is a Grant registered 10th of July 1942—A. W. Briggs trustee to Henry Madill and Ruth McGill. *REQUIRED* evidence that A. W. Briggs had authority to deal with the property and production and deposit of the Trust Agreement.”

By letter this answer was given:

“(8) Alfred W. Briggs obtained title to the property by Instrument No. 40226, in which he was described as ‘Trustee’. Since he conveyed in the same capacity, there need be no enquiry as to the subject of the trust.”

The requisition and answer arose out of an agreement in writing dated 27th September 1946, by which the purchaser, Frank Seperich, offered to purchase and the vendor, Henry Madill, agreed to sell lot 24 on the west side of Enola Avenue in the township of Toronto, in the county of Peel, according to registered plan F 20.

The only material filed in support of the application was: the affidavit of the purchaser’s solicitor, which disclosed the information above set forth; an abstract of title from the office of the Registrar of Deeds of the County of Peel; a certified copy of the deed transferring the land to Alfred W. Briggs, no. 40226, and a certified copy of the deed from Alfred W. Briggs to Henry Madill et al., no. 41899. It does not appear that any effort has been made by the vendor to clear up the questions raised by the purchaser, and he relies upon the answer made to the requisitions as being sufficient.

If the facts were simply those disclosed by the abstract, namely, that Alfred W. Briggs was described as trustee in the deed by which he acquired the title, which deed was in the ordinary form used where the purchaser is not a trustee (that is to say, the title was granted to him in fee simple, to have and to hold unto himself, his heirs and assigns, to and for his and their sole and only use forever, subject to the reservations, limi-

tations, provisoes and conditions expressed in the original grant from the Crown), and that in the deed, no. 41899, by which he conveyed to the vendor, he was also described as trustee, this case would come within the decision of *Re McKinley and McCullough* (1919), 46 O.L.R. 535, 51 D.L.R. 659.

In the present case the latter deed was in the usual form used when an absolute owner conveys. The grant was in fee simple to the grantees, their heirs and assigns, to have and to hold as joint tenants, to and for their sole and only use forever and subject to the said reservations expressed in the original grant from the Crown. It contained the grantor's usual covenants of right to convey, that the grantee should have quiet possession of the lands free from all encumbrances; that he would execute such further assurances of the lands as might be requisite; that he had done no act to encumber the lands and that he released all his claims upon the lands to the grantees.

The real difficulty raised by the purchaser arises out of the land transfer tax affidavit attached to the first deed, namely no. 40226, in which Mr. Briggs sets forth that he did not give any consideration for the transfer of title and that "I am to hold as Trustee". The purchaser's counsel contends that this last sentence takes the present case out of the law as laid down by *Re McKinley and McCullough*, *supra*, and that the basis of the decision of the Court in that case was that the lapse of many years left the inference that those acts which had been done had been properly done. He also contends that such an interpretation is in accordance with the views expressed by Mr. Justice Middleton in *Re Thompson and Jenkins*, 63 O.L.R. 33, [1928] 4 D.L.R. 564, particularly in the second paragraph on p. 35.

The vendor's counsel, on the other hand, contends that the cases cited support his view that the information disclosed in the deeds was no more than constructive notice of the trust, and was, therefore, not notice of any trust binding upon the purchaser.

The vendor's counsel, in addition to referring to the two cases cited, also referred to *In re Harman and Uxbridge and Rickmansworth Railway Company* (1883), 24 Ch. D. 720; *In re Chafer and Randall's Contract*, [1916] 2 Ch. 8; *In re Soden and Alexander's Contract*, [1918] 2 Ch. 258. These English cases deal with constructive notice and are not applicable because by s. 74 of The Registry Act, R.S.O. 1937, c. 170, there must be actual

notice of a prior claim in order to bind a purchaser. The effect of this section and of s. 75, which states that no equitable lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same person, his heirs and assigns, have been fully considered in our own Court of Appeal in *Peterkin v. McFarlane* (1884), 9 O.A.R. 429, particularly in the judgment of Proudfoot J., and in the Supreme Court of Canada which approved of his reasons in the same case, *sub nom. Rose et al. v. Peterkin* (1885), 13 S.C.R. 677.

After carefully considering all of the cases cited above, I have come to the conclusion that the material filed does not give the purchaser actual notice of a trust, and the requisition has therefore been satisfactorily answered. In my view, to constitute actual notice there ought to have been something more than the words "I am trustee" and the non-payment of land transfer tax.

An order will issue in accordance with the reasons expressed.

Order accordingly.

Solicitor for the purchaser: Murray Kaplan, Toronto.

Solicitors for the vendor: Copeland and Clement, Cooksville.

[COURT OF APPEAL.]

Smallman v. Moore et al.

Contracts—Breach of Promise of Marriage—Whether Action Survives against Executors of Deceased Promisor—Corroboration—The Trustee Act, R.S.O. 1937, c. 165, s. 37(2).

Evidence—Corroboration—Claims against Executors of Deceased Person—Breach of Promise of Marriage—What Must be Corroborated—The Evidence Act, R.S.O. 1937, c. 119, ss. 10, 11.

Executors and Administrators—Actions against—What Causes of Action Survive—Breach by Deceased of Promise of Marriage—The Trustee Act, R.S.O. 1937, c. 165, s. 37(2).

Where the personal representatives of a deceased person are sued for damages for breach by the deceased of a contract to marry the plaintiff, the plaintiff's evidence, under s. 11 of the Ontario Evidence Act, must be corroborated, not merely as to the promise to marry (which corroboration is required by s. 10 of the same Act), but as to the breach thereof by the deceased. The breach is the "matter occurring before the death" which is in issue in the action, and in the absence of corroboration on this issue the plaintiff cannot succeed.

Per Hogg J.A.: If an action for breach of promise to marry survives at all against the personal representatives of a deceased promisor, which is doubtful, it can only be for special damages of a limited character, and if such damages are not proved the action must fail. *Finlay v. Chirney et al.* (1888), 20 Q.B.D. 494; *Quirk v. Thomas (Executor of)*, [1916] 1 K.B. 516, discussed; *Davy v. Myers (Executors of)* (1824), Taylor 89, not followed; other authorities referred

to. Such an action is not an action for "a wrong" within the meaning of s. 37(2) of The Trustee Act, where the word "wrong" is apparently used as synonymous with "tort". *Hunter v. Boyd* (1901), 3 O.L.R. 183 at 188, applied.

AN APPEAL by the defendants from the judgment of Urquhart J., pronounced after a trial with a jury at St. Catharines. The facts, and the findings of the jury, are fully set out in the reasons for judgment of HENDERSON J.A.

13th and 14th November 1946. The appeal was heard by HENDERSON, HOPE and HOGG JJ.A.

S. S. MacInnes, K.C. (R. B. Law, K.C., with him), for the defendants, appellants: There was no corroboration of the plaintiff's evidence that there had been a breach of the contract to marry, and this, under s. 11 of The Evidence Act, R.S.O. 1937, c. 119, was fatal to the plaintiff's case. The learned trial judge should have taken the case from the jury on this ground. It is a question of law, for the judge, whether or not there is any "material evidence in corroboration", although its sufficiency is for the jury, and if there is no evidence which can be considered corroborative, it is the judge's duty to withdraw the case from the jury: 16 Halsbury, 2nd ed. 1935, p. 555; *Wiedemann v. Walpole*, [1891] 2 Q.B. 534 at 541; *Hubin v. The King*, [1927] S.C.R. 442, [1927] 4 D.L.R. 760, 48 C.C.C. 172. In *Hawley v. Hand* (1921), 50 O.L.R. 444 at 448, 64 D.L.R. 504, the Court was dealing with corroboration required, not by statute, but merely by a rule of practice, and that case is inapplicable where the question arises under s. 11 of The Evidence Act.

The corroboration must be of the main fact in issue: *Elgin v. Stubbs*, 62 O.L.R. 128 at 135, [1928] 2 D.L.R. 838; *Thompson et al. v. Coulter* (1903), 34 S.C.R. 261; *Bonnell v. Smith* (1914), 6 O.W.N. 414, 26 O.W.R. 689. Here, corroboration was required of the plaintiff's evidence, not merely as to the promise to marry, but as to the breach. There is no evidence in the record which can be considered corroborative on that issue. All the evidence which is consistent with a breach is equally consistent with a mere postponement of the marriage, without breach of contract, and in such circumstances it cannot be corroboration: *Grant v. Cornock* (1889), 16 O.A.R. 532 at 541; *Trott v. Mott*, [1944] 3 D.L.R. 58 at 62; *Trott v. Mott*, [1942] O.W.N. 513, [1942] 4 D.L.R. 150 at 153, affirmed *sub nom. Mott v. Trott*, [1943] S.C.R. 256, [1943] 2 D.L.R. 609. The judge wrongly told the jury that

the corroboration need not be as to the breach, but might be of some other material fact.

If this cause of action survives at all against the personal representatives of a deceased promisor, it can only be for special damages, and the claim for general damages should have been withdrawn from the jury. The action arises *ex contractu*, not *ex delicto*, and therefore special damages alone are recoverable: *Finlay v. Chirney et al.* (1888), 20 Q.B.D. 494; *Quirk v. Thomas (Executor of)*, [1916] 1 K.B. 516 at 532. The only case which appears to support a claim for general damages in such circumstances is *Davy v. Myers (Executors of)* (1824), Taylor 89, and that case is not binding on this Court, because it was not decided by a true Court of Appeal, set up by statute. The policy of the Courts has always been not to extend the list of actionable wrongs, and not to extend the classes of case in which general damages may be recovered: *Hellwig v. Mitchell*, [1910] 1 K.B. 609; *McDonald v. Mulqueen* (1922), 53 O.L.R. 191 at 195.

The damages were assessed by the jury upon a wrong principle, and were excessive. The jury appear to have considered the plaintiff's loss of position, and the fact that, instead of being maintained in comfort, she will have to work for the rest of her life, as she has done in the past. She has suffered no actual loss. The learned trial judge told the jury that the deceased was "fabulously" wealthy, and read excerpts from a letter written by the deceased to the plaintiff, in very affectionate terms, which was bound to have a prejudicial effect.

The trial judge failed to define the special damages which are recoverable in a case of this kind. The jury apparently based their award of special damages upon the wardrobe bought by the plaintiff, but on the plaintiff's own evidence, the clothes had all been worn before a date was set for the marriage. Such damages, in any event, are not recoverable: *Quirk v. Thomas (Executor of)*, *supra*, at p. 534. The jury apparently also awarded damages for the giving up of the plaintiff's business. There was no loss of social position, because no one apparently knew of the engagement.

A highly prejudicial article appeared in a newspaper during an adjournment of the case, and the trial judge did not adequately remove the effect of this article from the jury's minds.

The jury's finding as to a breach, quite apart from the question of corroboration, is not supported by the evidence.

G. T. Walsh, K.C. (H. E. Harris, K.C., with him), for the plaintiff, respondent: There are two main things which the plaintiff must prove, the promise to marry and the breach thereof. Corroboration of either is sufficient to satisfy s. 11 of The Evidence Act, and it is not necessary that the corroboration should be specifically of the breach: 4 C.E.D. (Ont.), p. 716; *Bayley v. Trusts and Guarantee Co. Ltd.* (1930), 66 O.L.R. 254, [1931] 1 D.L.R. 500. Corroboration is required to establish the veracity of the witness, and it must be of some fact necessary to obtain a verdict. It is not necessary that all facts be corroborated: *McGregor v. Curry* (1913), 31 O.L.R. 261 at 270, 20 D.L.R. 706, affirmed 25 D.L.R. 771 (P.C.); *Ollson v. Fraser, Barned and Powell*, [1945] O.R. 69 at 74-5, [1945] 1 D.L.R. 481; *Mott v. Trott*, [1943] S.C.R. 256 at 260-1, [1943] 2 D.L.R. 609.

There was ample corroboration of the plaintiff's evidence as to the promise, and the sufficiency of the corroboration is for the jury.

It was also for the jury to say whether there was a breach of the promise to marry, or a mere postponement of the marriage: Phipson on Evidence, 7th ed. 1930, p. 31. The jury found that there had been a breach, and there is evidence to support that finding.

Davy v. Myers (Executors of), *supra*, should be followed by this Court. It is cited as still good law in 22 Can. Abr. 114, and was decided by the judges of the Court of King's Bench, the Court of Appeal of that day. The action therefore lies against the personal representatives for general as well as special damages. It is not right to assume that a colonial Court is wrong merely because it differs from the English Court of Appeal: *McMillan v. Wallace*, 64 O.L.R. 4 at 7, [1929] 3 D.L.R. 367.

General damages are recoverable in the action, both at common law and under s. 37(2) of The Trustee Act, R.S.O. 1937, c. 165. The trial judge correctly charged the jury as to the elements of general damage, and they were entitled to take into consideration the injury to the plaintiff's feelings and affections, her wounded pride, the prejudice to her future prospects, and the actual loss of the marriage: Chitty on Contracts, 19th ed. 1937, pp. 856-7; Mayne on Damages, 10th ed. 1927, p. 481. The jury were entitled to consider the means of the deceased.

There can be no fixed rule as to the assessment of damages by a jury; the judge lays down the general principles, but it is

peculiarly for the jury to decide on quantum: *D. v. B.* (1917), 40 O.L.R. 112 at 120, 38 D.L.R. 243. The verdict cannot be set aside unless the Court is satisfied that there has been a gross miscarriage of justice: The Judicature Act, R.S.O. 1937, c. 100, s. 37.

S. S. MacInnes, K.C., in reply.

Cur. adv. vult.

5th December 1946. HENDERSON J.A.:—An appeal from a judgment of Urquhart J., after a trial with a jury, who returned a verdict in favour of the plaintiff for \$100 special damages, and \$25,000 general damages, the action being for breach of promise of marriage.

The questions propounded to the jury, and their answers thereto, are as follows:

"1. Q. Did the deceased Mr. Moore and the plaintiff make an agreement to marry? (Answer Yes or No.) A. Yes.

"2. Q. If your answer to question no. 1 is yes, when was that agreement made? A. Sometime between the death of Miss M. Moore and February 18, 1945.

"3. Q. If your answer to question no. 1 is yes, was the marriage set for any particular date? (Answer Yes or No.) A. Yes.

"4. Q. If so, what date? A. February 24th, 1945.

"5. Q. If your answer to question no. 4 is a date in 1945, did the parties afterwards agree to the postponement of the marriage? (Answer Yes or No.) A. No.

"6. Q. If the answer to no. 1 is yes, did the deceased break the promise to marry? (Answer Yes or No.) A. Yes.

"7. Q. If your answer to question no. 6 is yes, what damages (if any) did the plaintiff suffer by reason of the breach of promise to marry? A. (a) Special damage \$100.00

(b) General damage (not including Punitive Damages) 25,000.00

(c) Punitive Damages (if any) nil

Total.....\$25,100.00"

The questions to be determined upon this appeal are:

(1) Was there a breach of the contract to marry?

(2) Was there evidence corroborative of the plaintiff's allegation of a breach of the contract to marry?

The plaintiff is forty-six years of age, and is a widow with three children, aged twenty-one, eighteen and sixteen respec-

tively. She was married in 1923 and there was a separation agreement in 1934 by which the plaintiff was given the custody of her children, and by which there was turned over to her a drug business then carried on in the town of Thorold, and a house. She obtained a divorce from her husband in 1941.

The plaintiff became acquainted with the deceased, Frank Williams Moore, in 1936, and the plaintiff and the deceased Frank Williams Moore appear to have "kept company" for a number of years until some time between 12th January and 18th February 1945, when the agreement to marry is alleged to have been made.

The evidence is that there was a previous date set for the marriage, but that date was postponed, owing to the death of a maiden sister of the deceased. It appears that the deceased lived in Thorold with two maiden sisters, namely, Maud Moore and Nellie Moore, and a married sister, Mrs. Georgia McCleary, and the defendant Nellie A. Moore is now the only surviving sister.

There is ample evidence that there was a contract of marriage, and that the last date set for the marriage was 24th February 1945.

The plaintiff's evidence, on which the alleged breach is founded, is as follows:

"MR. FLEMING: Q. Did you see Miss Moore during this time? A. Yes, I went to Miss Moore's house, or Frank Moore's home, it would be on the Sunday night, it would be after Valentine's day and before the date set for the marriage. I went into the house, he came to my home and took me down there, that was it—I went into the house and Nellie was crying then and it was that night after we went home, we were sitting in the car in the front of my home and Mr. Moore told me that he couldn't go through with the marriage on account of the condition of his sister.

"Q. And what did you say to that? A. I felt very hurt and said that wasn't—I didn't consider that was sufficient excuse, owing to the fact that we had postponed the other marriage on account of his sister Maud, and that Nellie wasn't alone, that she had with her her niece Marjorie.

"Q. And what did he say to that? A. He said in leaving me—

"HIS LORDSHIP: Q. What? A. When I left him that night, that he still loved me and regardless of what happened I was well taken care of.

"Q. How old was he at that time? A. He was sixty-two.

"Q. Was he in good health? A. He had a heart condition.

"Q. Regardless of what happened—what? A. I was well taken care of.

"Q. He had a heart condition—what do you mean by that? A. Well, he had been to the McGregor Clinic—or was it at that time? Around that time. And they had told him that he had a heart condition, that he was to take it easy.

"Q. Did he tell you that? A. Yes, he told me that.

"Q. When was he at the McGregor Clinic? A. In February some time, I think.

"Q. In February? February what year? A. That would be 1945, last year.

"Q. Shortly before he died? A. Yes.

.....
"MR. MACINNES: Q. The discussion that I have referred to as having taken place between you and Mr. Moore on the Sunday night before the 24th February— A. Yes.

"Q. Took place in his car in front of your home? A. That is right.

"Q. Everything was very friendly, I believe? A. I wouldn't say friendly.

"HIS LORDSHIP: Q. What day was February 24th—a Saturday? A. Saturday.

"MR. MACINNES: February 24th would be a Saturday.

"HIS LORDSHIP: Q. It would be the Sunday before, that would be a week before? A. Yes.

"MR. MACINNES: That would be the 18th February.

"Q. Now, referring to that occasion do you remember being asked question 388, or 389: 'Any anger between you?' and your answer 'No'? A. There was no fight, there was no anger.

"Q. Do you remember making that answer? A. Yes, I do.

"Q. And do you remember being asked this question and making this answer: 'Q. 390. Everything was very friendly? A. Yes'.

"HIS LORDSHIP: Q. Did you make those answers? A. Maybe I did."

The evidence as to the conduct of the plaintiff and the deceased Frank Williams Moore in regard to each other is all to the effect that there was no outward change in their relations. They appear to have "kept company" and to have been as intimate up to the time of his death as before the alleged breach. They had dinner together on the 24th February 1945, which was the date set for the marriage. The conduct of the parties up to and including the death of the deceased, and subsequent thereto on the part of the plaintiff, is inconsistent with there having been a breach of the promise and is consistent only with the view that the marriage remained in contemplation.

Mrs. Gladys Smith, a witness called for the plaintiff, is her assistant in the business carried on by the plaintiff as the Smallman Drug Company, and her evidence is that up to the time of his death the late Mr. Moore was a daily visitor at the store and that there was no apparent change in the relations between him and the plaintiff. It is also to be noted that according to the evidence, there had been no announcement of an engagement or intended marriage in Thorold, and that the deceased's sisters had not been told of it.

Frank Williams Moore died on the 17th April 1945, and it will be noted that it appears from the evidence I have quoted that at the time of the alleged breach he had been for examination at the McGregor Clinic, a well-known clinic in the city of Hamilton, and had been told that he had heart disease, which a few weeks later was fatal.

The action is for breach of contract, and I am of opinion that it is the breach of contract that is required to be corroborated, and that this cannot be supplied by evidence corroborative of the promise to marry. There was a great deal of argument as to this upon the hearing of the appeal, and it was sought to have the Court determine that corroboration of the promise is sufficient.

Counsel for the plaintiff was unable to point to any evidence corroborative of the breach, and, indeed, it follows, so far as I am concerned, from my finding, that there was no breach.

It becomes unnecessary for me to discuss the objections urged by the defendants to the charge of the learned trial judge, which are outlined in detail in the notice of appeal.

For these reasons I think the appeal must be allowed with costs and the action dismissed with costs.

HOPE J.A.:—After having had the opportunity of reading the reasons for judgment of my brother Henderson herein, I found that I agreed with him in the result, but it was my wish to add certain further reasons dealing with the relation between ss. 10 and 11 of The Evidence Act, R.S.O. 1937, c. 119. I have now had an opportunity of reading the reasons of my brother Hogg, which are in agreement in result, and which I find adequately cover the point which I wished to discuss as to The Evidence Act.

I therefore concur in the disposition of this appeal and, in the light of the reasons, I feel that it is not necessary to deal with any further point raised by counsel herein.

HOGG J.A.:—I have had the privilege of reading the reasons for judgment in this appeal of my brother Henderson, and agree in the result arrived at by him.

I am of the opinion that the appeal must succeed because of the lack of corroboration, by some other material evidence, of the evidence given by the plaintiff in support of the claim that there was a breach of the contract to marry.

Section 11 of The Evidence Act, R.S.O. 1937, c. 119, provides, *inter alia*, that in an action against the administrator of an estate:

“ . . . an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.”

This action was brought by Mrs. Smallman, the plaintiff, against the administrator of the estate of the late Frank Williams Moore. The matter in issue is the alleged breach of a promise of marriage, and this breach of contract necessarily occurred before Moore's death. The plaintiff, therefore, would not be entitled to judgment for the claim made by her in the action on her own evidence, unless it is corroborated by some other material evidence.

In the recent case of *Ollson v. Fraser, Barned and Powell*, [1945] O.R. 69, [1945] 1 D.L.R. 481, Robertson C.J.O. said:

“The corroboration need not be of every detail of respondent's case. It is sufficient that the evidence relied upon as corroboration is evidence of some material fact or facts that support the testimony that requires corroboration.”

The testimony in the present action that requires corroboration by some other material evidence is that given by the plaintiff in proof of the essence of her claim, that is to say, in proof of the breach of the contract to marry. It is required, in order that the plaintiff should succeed, not only that her testimony should be held to be true, but that there must also be some corroboration of the evidence given by her as to the matter in respect of which judgment is sought.

Counsel for the plaintiff argued that if there was corroboration of the promise to marry, that was sufficient corroboration to satisfy s. 11 of the statute. This argument is open to the obvious objection that because of the provisions of s. 10 of The Evidence Act, "The plaintiff in an action for breach of promise of marriage shall not recover unless his or her testimony is corroborated by some other material evidence in support of the promise", and to accede to this argument would be to hold that s. 11 of the statute may be wholly disregarded if there exists the corroboration which is required by the said s. 10.

Section 11 sets out that judgment shall not be obtained on the plaintiff's own evidence. Judgment for what? Judgment for damages for breach of promise of marriage. It is the breach of the contract to marry which is the "matter occurring before the death of the deceased person" that must be proved in order that the plaintiff may succeed and obtain judgment, and it is the plaintiff's evidence with respect to this matter which must be corroborated by some other material evidence. In the case at bar, the necessary corroboration to satisfy s. 11 of The Evidence Act is not to be found in the evidence.

This is sufficient to dispose of the appeal, but in view of the arguments of counsel and the importance, in my view, of the question whether the action could be maintained, I have given this branch of the case careful consideration, and as a result I have doubt whether the action is maintainable, and in any event only for special damages of a limited character.

The respondent contended that an action for breach of promise of marriage is maintainable at common law against the personal representatives of a deceased promisor, and also by virtue of s. 37(2) of The Trustee Act, R.S.O. 1937, c. 165, not only for special but for general damages.

A general principle pertaining to the law of contracts is as stated in Leake on Contracts, 8th ed. 1931, at pp. 529-30, that:

"Some contracts, though expressed in absolute terms are by the nature of the matter so obviously dependent upon the possibility of performing the promise, that the parties are presumed to have excepted the events which rendered the performance according to the promise impossible; and of this character generally are contracts in which a person binds himself to do something which requires to be performed by him in person. Thus contracts to marry are impliedly conditional upon the continued existence of the parties, and are put an end to by the death of either; and no action will lie by or against the executor of a deceased party for breach of promise committed before the death; except, it is said, for special damage accrued from the breach independent of the loss of marriage."

According to Chitty on Contracts, 18th ed. 1930, at p. 627:

"What special damage would be sufficient to support such an action it is difficult to see, for it has been decided that it does not include loss by reason of the plaintiff's having given up a business interest at the defendant's request . . . or, in ordinary circumstances, the plaintiff's expenditure upon clothing in anticipation of the marriage."

In *Finlay v. Chirney et al.* (1888), 20 Q.B.D. 494, in the Court of Appeal, Lord Esher M.R., referring to this question of special damage, said at p. 500:

"I think it can only exist in cases where the plaintiff can shew that, besides the promise to marry, there was at the time of the making of the contract another promise affecting the personal property of the one party or the other."

It was held in that appeal that an action for breach of promise of marriage, where no special damage was alleged, did not survive against the personal representatives of the promisor, and that such special damage as would cause the right of action to survive must be damage to the property and not to the person of the promisee, and must be within the contemplation of both parties at the time of the promise.

In *Quirk v. Thomas (Executor of)*, [1916] 1 K.B. 516, the plaintiff brought action for breach of promise of marriage against the executor of the promisor, in which she claimed, as special damage, loss suffered by her through having given up a profitable business at the request of the deceased, and in consideration of his promise to marry her. It was held by Lush J., the trial judge, that the plaintiff was not entitled to maintain

the action. In the Court of Appeal, Phillimore and Pickford L.JJ. held that, assuming that the action would lie to recover special damage, the loss to the plaintiff by reason of her having given up her business was not special damage flowing from the breach, and was therefore not recoverable. Swinfen Eady L.J. held that the lack of corroboration of the alleged promise to marry was sufficient to dispose of the appeal, but he further said, at pp. 526-7:

" . . . but having regard to the argument addressed to us I must add that I have grave doubts whether the action will lie, even if special damage be proved. The passages in *Chamberlain v. Williamson* [*infra*] and in *Finlay v. Chirney* [*supra*] relied upon by the appellant were dicta only. There is no case in which such damage has been actually recovered. The action to recover damages for breach of promise to marry is an anomalous one, and as such actions have been known to the law from a date anterior to 1651 (see *Baker v. Smith* (1651), Sty. 295, 82 E.R. 722), and damages have never yet been recovered after the death of the promisor, the Court would probably take the view that the action ought not to be further extended by judicial decision. The action is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff. . . . It is difficult to see how, in such a case, there can be any 'special damage' properly so called. The sounder view appears to be that the action will not lie in any case after the death of the promisor."

Lord Justice Phillimore referred to the question of whether the action would survive against the executor of the contract breaker, and at pp. 531-2 he discussed the judgments in *Chamberlain v. Williamson* (1814), 2 M. & S. 408, 105 E.R. 433, and *Finlay v. Chirney et al.*, *supra*. With respect to the latter case, he said:

" . . . there is much in the judgment of Lord Esher to show how reluctant he was to allow any such action at all. Indeed he says: 'I have grave doubts whether it would not be the wisest course to say that even with special damage the action will not lie, but I am not prepared upon the authorities to go that length. I can hardly conceive of a case where such special damage could arise as would support the action' . . . I should have been glad if Lord Esher had followed his own judgment, and if the other members of the Court had concurred with him. But for the

purposes of this case, without desiring to express any opinion of my own, I am content to take it to be the law that in this case an action would lie for special damage."

Lord Justice Pickford said, at p. 537, with regard to this question whether the action would lie:

"It is said that it will in accordance with the dictum of Lord Esher in *Finlay v. Chirney*. . . . Assuming these words to cover this case, they do not even amount to a dictum that the action will lie, but only to a suggestion that it possibly may, made by a learned judge who had earlier in the same case stated the extreme difficulty of seeing any special damage which would support such an action."

Lord Justice Pickford said he would assume that there might be special damage affecting the plaintiff's property of such a nature as to support an action for breach of promise of marriage against the promisor's executor; "She has by his death lost her claim for general damages, but that cannot make the loss of the business a loss arising from the breach. . . . The remedy asked for here is not a remedy that belongs to the ordinary category of actions *ex contractu*. I think, therefore, that on principle and authority the suggestion made by Lord Esher M.R. is not sound and that it probably arose from the learned judge overlooking the distinction between the consideration given to obtain a contract and the measure of damages for its breach."

It is difficult, I think, to hold any other view than that the personal element is the dominating feature in an action for breach of promise to marry and it is not a simple matter to grasp why the general rule stated in the maxim *actio personalis moritur cum persona* does not apply. There is hardly an obligation more personal in its nature than that arising out of a promise to marry, although there might be some incidental injury to property.

The decision of the majority in *Quirk v. Thomas (Executor of)*, *supra*, does not seem to overrule the judgment in *Finlay v. Chirney et al.* although all of the judges subject it to severe criticism and throw doubt on its being a correct exposition of the law. See also *Riley v. Brown* (1929), 98 L.J.K.B. 739.

The respondent in the present case relies upon the old Upper Canada case of *Davy v. Myers (Executors of)* (1824), Taylor 89, in support of the contention that an action for breach of promise of marriage is maintainable at common law against the personal representatives of a deceased promisor, not only for special dam-

ages but also for general damages. The headnote in this case reads:

"Where the plaintiff had recovered a verdict against executors for a breach of promise of marriage made by their testator, this court would not (on the ground that such an action could not lie against personal representatives) arrest the judgment."

A judgment was recovered in an action of *assumpsit* against the executors of William Myers for breach of promise of marriage in the lifetime of the testator, and, a verdict having been found for the plaintiff, a motion was made to arrest judgment on the ground that no such action can be maintained against the executors for the reason that the action was a personal one and therefore died with the person.

Powell C.J. expressed the opinion that the cases of the survivor of actions for and against executors were still confused and appeared to be decided rather on particular circumstances than on general principles. He said, at p. 102: "... it appears doubtful if the action lies at all, without an averment of special damage in the life of the testator." Nevertheless he supported the judgment.

Campbell J. was of the opinion that without an allegation of special damage, "this action is not maintainable against executors", and held that the judgment ought to be arrested.

Boulton J. was of the opinion that the action survived against the executor because it was based on contract or a promise of the testator and did not arise *ex maleficio*, and that executors were answerable in all personal actions which arise *ex contractu*.

Boulton J. said at p. 112:

"Lord Ellenborough [in *Chamberlain v. Williamson*, *supra*] plainly shews, that in an action by an executor or administrator, special damages must be stated on the record, for the court cannot see that the personal estate is injured—consequently cannot see that the executor is qualified to bring the action."

It is to be gathered from the report that the trial of the action with a jury was presided over by the Chief Justice, and that the matter then came before the Chief Justice and Campbell and Boulton JJ. of the Court of King's Bench, upon the motion made by the Attorney-General to show cause.

I do not think that the decision in the *Davy* case, given one hundred and twenty-two years ago, is binding on this Court. The Court hearing that case was not a Court of Appeal. Appeals

were heard by the Governor-in-Council. By 34 Geo. III, c. 2, enacted in 1794 by the first Provincial Parliament of Upper Canada, it was provided that an appeal should lie to the Governor and Executive Council from all judgments of the court of King's Bench subject to certain limitations. In 1849, by 12 Vict. c. 63, s. 38, of the Province of Canada, there was constituted a Court of Error and Appeal, which was given full appellate civil and criminal jurisdiction, from all judgments of the Courts of King's Bench, Common Pleas and Chancery.

The reasons given by the majority of the Court do not support the judgment pronounced, nor do they appear to uphold the proposition that general damages can be recovered in an action such as that with which this appeal is concerned.

The respondent further contends that by the provisions of s. 37(2) of The Trustee Act, R.S.O. 1937, c. 165, the action is maintainable. This subsection reads:

“(2) Except in cases of libel and slander, if a deceased person committed a wrong to another in respect of his person or property, the person wronged may maintain an action against the executor or administrator of the person who committed the wrong.”

It is argued by counsel for the respondent that the breach of the contract to marry is the commission of a wrong and that therefore the action falls within the four corners of this subsection. The wrong mentioned is, however, not a wrong in the sense that a breach of contract may be termed a wrongful act.

Street J. in *Hunter v. Boyd* (1901), 3 O.L.R. 183, in discussing s. 11 of The Trustee Act, R.S.O. 1897, c. 129, which is in part, in effect the same as the subsection now under consideration, said, at p. 188: “That section is the authority for the claim against Boyd's estate for his torts committed when he lived”.

The appeal should be allowed with costs.

*Appeal allowed with costs and action
dismissed with costs.*

Solicitors for the plaintiff, respondent: Trapnell, Fleming & Harris, St. Catharines.

Solicitors for the defendants, appellants: Raymond, Spencer, Law & MacInnes, Welland.

[BARLOW J.]

Re Metcalfe.

Wills—Certainty—Perpetuity—Charitable Bequest Contingent upon Gift Void for Uncertainty.

A testator directed that the income from his estate should be paid to his widow for her lifetime, then to his three children for their lives. He then directed that upon the death of any of his children "the share of income . . . which such deceased child received shall thereafter be paid to such deceased child's children or descendants, per stirpes and not per capita . . . and upon the death of all my children and their descendants, the said income of the estate shall be devoted to and distributed amongst" four charitable institutions.

Held, (1) the gift of income to the testator's widow and to his children was valid, but the gifts to grandchildren and more remote descendants were void as contrary to the rule against perpetuities. The testator clearly intended that so long as any descendant, of whatever degree, was alive the income should be paid to that descendant, and this might postpone the distribution long beyond the period of lives in being and 21 years thereafter. *Re Sutherland* (1910), 2 O.W.N. 1386; *Re Hipwell*; *Hipwell v. Hewitt*, [1945] 2 All E.R. 476, referred to.

(2) The gift to the charitable institutions, there being no other provision in the will as to corpus, would operate, if valid, as a gift of corpus. Theobald on Wills, 9th ed. 1939, p. 392, referred to. But the gift was not a separate one, vesting in the institutions on the testator's death, subject to the life tenancies, but was dependent or expectant upon the earlier gift, already found to be invalid. It could not take effect until the death of the last descendant of the testator, an event which might never happen, and was therefore also invalid. *In re Abbott*; *Peacock v. Frigout*, [1893] 1 Ch. 54 at 57; *Chamberlayne v. Brockett* (1872), L.R. 8 Ch. 206, applied; other authorities referred to.

The testator also provided that an annual sum should be given "to such religious charitable and benevolent purposes as my executors . . . in their discretion shall determine". *Held*, this gift was void for uncertainty. The word "and" should be read as "or", and the effect of the provision was that the executors had a discretion to devote the whole amount to benevolent purposes, which would not be a valid charitable bequest. *In re Eades*; *Eades v. Eades*, [1920] 2 Ch. 353; *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson et al.*, [1944] A.C. 341, applied; *Williams v. Williams*; *Williams v. Kershaw* (1835), 5 L.J. Ch. 84, referred to.

A MOTION by the executors and trustees of the estate of George Metcalfe, deceased, for the opinion, advice and direction of the Court.

14th November 1946. The motion was heard by BARLOW J. in Weekly Court at Toronto.

D. R. C. Harvey, for the executors and trustees, applicants.

J. Shirley Denison, K.C., for descendants of the testator.

P. D. Wilson, K.C., Official Guardian, for infants and unborn issue.

J. M. Bullen, K.C., *A. T. Whitehead, K.C.*, and *J. G. Middleton*, for various charitable institutions.

(*Miss*) *F. Levis*, for the Public Trustee.

5th December 1946. BARLOW J.:—An application for an order construing the will of the late George Metcalfe, and for the opinion, advice and direction of the Court on the following questions respecting the administration of the estate:

“1. Is the bequest contained in Clause 3 of the Will void for uncertainty or for any other reason?

“2. What is the intention of the testator with respect to the disposition of income from his estate; and is such bequest of income wholly or partially void for remoteness or for any other reason; and if so, to what extent?

“3. In the events which have happened, to whom and in what proportions is such income payable?

“4. Is the bequest contained in Clause 8 of the Will to the institutions named therein void for remoteness or for any other reason, and if not, then in the events which have happened, to which of such institutions and in what proportions and at what time or times is such bequest payable?

“5. What is the proper disposition of the corpus of the Estate?”

The late George Metcalfe died on the 15th June 1901, leaving a last will and testament, dated the 4th March 1901, probate of which was granted by the County Court of the County of York to the executors named in the will on the 25th June 1901.

The deceased left surviving his widow, Maria Metcalfe, two sons, George Henry Metcalfe and Alfred Metcalfe, a daughter, Ada Maria Lightfoot, and two granddaughters, Olive May Lightfoot and Mary Gertrude Lightfoot, children of the said Ada Maria Lightfoot.

The widow Maria Metcalfe died on the 21st December 1901.

The granddaughter Olive May Lightfoot died on the 2nd April 1902, and the son George Henry Metcalfe died on the 8th December 1907. The two latter died intestate and without issue.

The daughter of the deceased, Ada Maria Lightfoot, died intestate on the 8th July 1924, leaving her surviving her husband, Robert John Lightfoot, and a daughter Mary Gertrude Spence. The said Mary Gertrude Spence died intestate on the 5th May 1945, leaving her surviving a son Harold Byron Spence, a great-grandchild of the testator. The said Harold Byron Spence has one child, Sherrill Ada Spence, an infant and a great-great-grandchild of the testator.

The testator's son Alfred Metcalfe died on the 5th May 1937, leaving him surviving his children George Alfred Metcalfe, Edward Herbert Metcalfe, Flora Louise Metcalfe, Arthur Frederick Metcalfe and Walter David Metcalfe, being grandchildren of the testator.

The grandchild of the testator, George Alfred Metcalfe, has one child, Ronald George Metcalfe, who is a great-grandchild of the testator.

All are lineal descendants of the testator and are of full age, with the exception of Sherrill Ada Spence and Ronald George Metcalfe.

The testator gives his property to his trustees for the purposes set out in the will, with the power to invest and reinvest. He first directs "that Fifty Dollars out of the income derived from my estate, shall be paid and distributed annually to such religious charitable and benevolent purposes, as my executors or the survivors or survivor of them in their discretion shall determine, until the time arrives to pay the income to Charities under the eighth paragraph of this my Will".

Unless this is a charitable gift, it must fail for uncertainty.

A discretionary power is placed in the executors to pay the yearly sum of \$50 for religious, charitable and benevolent purposes. This gives to the executors the power to use the yearly sum of \$50 for benevolent purposes alone. The word "benevolent" cannot create a charitable trust. Furthermore, it is entirely within the executors' discretion to determine for which of the three purposes the money shall be used. The discretion of an executor will ordinarily not be interfered with by the Court: see *Re Williams*, [1946] O.W.N. 805, and cases there cited.

As I interpret the intention of the testator, the word "and" should be read as "or", so that it would read "for religious, charitable or benevolent purposes". Upon this interpretation (and I am satisfied that this was the intention of the testator), this is not a charitable gift and fails for uncertainty. See *In re Eades; Eades v. Eades*, [1920] 2 Ch. 353, where the testator made a gift "to such religious, charitable and philanthropic objects" as three named persons should jointly appoint. It was held that the word "and" must be read as "or", and that as one or more of the selected objects might be merely philanthropic and not necessarily charitable, no general charitable intention was shown and the gift in favour of the charity therefore failed.

This case appears to me to be directly in point. See also *Williams v. Williams*; *Williams v. Kershaw* (1835), 5 L.J. Ch. 84; also *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson et al.*, [1944] A.C. 341, more particularly at p. 365, where a testator by his will directed his executors to apply the residue of his estate "for such charitable institution or institutions or other charitable or benevolent object or objects in England" as they should, in their absolute discretion, select. The Court held this bequest to be void for uncertainty. The members of the House of Lords, in very exhaustive judgments in which they considered most of the English cases on this point, came to the conclusion that the executors, having been given an absolute discretion as to the distribution, could have distributed the residue to benevolent institutions which were not charitable, and they therefore found the gift to be void. An identical situation arises in the will at bar, where the trustees in their discretion could pay the yearly sum of \$50 for religious purposes, or charitable purposes, or benevolent purposes. I am therefore of opinion that para. 3 of the will is void.

The testator then gives the income from his estate to his widow for her life. At her death he gives the income equally to his two sons and daughter for their lives. The will then proceeds in para. 8 as follows:

"In case of the death of either of my sons, or daughter the share of income from the estate, which such deceased child received shall thereafter be paid to such deceased child's children or descendants, per stirpes and not per capita, in equal shares, when such issue or descendants respectively attains the age of 21 years, and until they attain that age, the said share of income shall be applied by my Executors and Trustees for their maintenance, care and education.

"In case the one so dying leaves no issue then alive, him or her surviving the income from such deceased child's share shall be paid to the surviving brothers or brother and sister or their respective descendants during their natural lives, and upon the death of all my children and their descendants, the said income of the estate shall be devoted to and distributed amongst the following institutions and organizations, for religious, charitable and benevolent purposes in equal parts semi-annually". Then follow the names of the four organizations represented on this application.

For a definition of "descendants" see *Re Sutherland* (1910), 2 O.W.N. 1386, 19 O.W.R. 702, where Middleton J. says: "'Descendants' means children and their children and their children to any degree and is, in most instances, and clearly in this, equivalent to 'issue'".

By the way in which the testator has used the words "children" and "issue" he meant the word "issue" to have its primary meaning, that is to include descendants of every degree: *Re Hipwell; Hipwell v. Hewitt*, [1945] 2 All E.R. 476.

It is clear that the gift of income to the widow and to the testator's three children is valid, but it would appear that the gift to grandchildren, great-grandchildren and their descendants is void for perpetuity.

In proceeding to construe the will according to the ordinary canons of construction (*Pearks v. Moseley et al.* (1880), 5 App. Cas. 714 at 719), without regard to the rule as to perpetuities, the testator gave his property to his executors with the clear intention that the income should be paid, first to his widow; next to his children; then to his children's children, and their children, and their descendants; and upon the death of the last descendant the income should then be given to the four charities named in para. 8 of the will. Shortly, the testator intended that as long as there were descendants of his, as defined in *Re Sutherland, supra*, the trustees should hold the corpus and pay the income to the successive descendants.

This carries the gift far beyond life or lives in being at the date of the death of the testator and twenty-one years thereafter. These limitations offend the perpetuity rule and are invalid.

But is the ultimate gift to the four charitable organizations also invalid by reason of the prior limitation having been found to be invalid for remoteness?

Counsel for these organizations contend that notwithstanding the fact that the earlier limitations are invalid for remoteness, the gift to them is valid. If this gift to the charities is dependent or expectant upon this prior gift, which I find to be void for remoteness, then it, too, is invalid. If, however, the gift to the charities is found to be separate, and not dependent or expectant upon the prior gift which I find to be void for remoteness, then it is a valid gift.

The words of the will are "and upon the death of all my children and their descendants, the said income of the estate shall be devoted to and distributed amongst the following institutions and organizations", then follow the names of the four charities. No gift of capital is made to anyone in the will. The income alone is given to the charities, without any limitation as to time. This, in my opinion, carries a gift of the capital, since no other disposition of the capital is made. See Theobald on Wills, 9th ed. 1939, p. 392: "A gift of the income of property to a person, without limitation as to time, is a gift of the capital, where no other disposition of the capital is made. This is the case, though the gift may be to the separate use, or through the medium of a trust."

Is there a vesting of the estate in the charities at the testator's death, with the enjoyment thereof deferred until the death of the last descendant of the testator, or is the gift to the charities conditional or contingent upon the death of the last descendant of the testator, which is an event which may never happen?

There is no independent gift to the charities. The only gift to the charities is contained in the direction to the trustees in the following words: "and upon the death of all of my children and their descendants, the said income of the estate shall be devoted to and distributed amongst the following institutions and organizations".

There is no certainty that the time will ever arrive when there will be no descendants of the testator living. The gift to the charities is dependent upon this event happening. The gift cannot take effect until this time arrives. See Hawkins on Wills, 3rd ed. 1925, p. 269: "It seems that the rule does not apply where the payment is to be made, not on attaining a given age, or marriage, but on marriage only. Thus a bequest to A., to be paid on his marriage, is *prima facie* contingent."

In the will before me for construction, the gift to the charities is, in my opinion, conditional or contingent upon the death of the last descendant of the testator, and does not vest until that time arrives. If it were a gift subject to a prior enjoyment by a life tenant, then it would be subject to an event certain, namely, the death of the life tenant. But in the case at bar the death of the last descendant is clearly an uncertain event, and it is therefore conditional or contingent.

The law applicable is clearly stated in *In re Abbott; Peacock v. Frigout*, [1893] 1 Ch. 54 at 57 (this law is applied and used in the cases relied upon by counsel for the charities, namely, *In re Canning's Will Trusts*; *Skues v. Lyon*, [1936] Ch. 309, and *In re Coleman; Public Trustee v. Coleman*, [1936] Ch. 528 at 535), where Stirling J. says:

"It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid. The reason appears to be that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted; and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation."

In the case at bar the gift to the charities does not take effect unless and until the prior limitation is exhausted, that is, exhausted by the death of the last descendant of the testator. This prior limitation, having been held void for remoteness, can never come into operation or be exhausted. In *In re Coleman; Public Trustee v. Coleman*, *supra*, where the ultimate trust for the son's children was subject to the happening of a certain event, namely, the death of W's widow, the gift to her was found to be void for remoteness. It is a clear case of the enjoyment of a vested gift being deferred until a time certain, namely, the death of W's widow, while in the case at bar the gift to the charities is dependent upon an uncertain event, namely, the death of the last descendant of the testator, which may never happen.

The law applicable is well stated in *Chamberlayne v. Brockett* (1872), L.R. 8 Ch. 206 at 211:

"... if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*."

See also Theobald *op. cit.*, p. 492: "Limitations dependent and expectant upon limitations void for perpetuities are themselves void, whether within the line of perpetuity or not."

For further reference see *In re Dalziel; Midland Bank Executor and Trustee Company, Limited v. St. Bartholomew's Hospital*, [1943] Ch. 277; *In re Lord Stratheden and Campbell; Alt v. Lord Stratheden and Campbell*, [1894] 3 Ch. 265; *In re Bowen; Lloyd Phillips v. Davis*, [1893] 2 Ch. 491; *Worthing Corporation et al. v. Heather*, [1906] 2 Ch. 532; and *Robinson v. Hardcastle et al.* (1788), 2 Term Rep. 241, 100 E.R. 131.

For the above reasons I therefore find that:

(1) The bequest contained in clause 3 of the will is void for uncertainty.

(2) The gift of the income to the widow and to the testator's three children is valid. The further gifts of income to the grandchildren and descendants are void for remoteness.

(3) The bequest to the charities contained in clause 8 of the will is void by reason of the fact that it is dependent and expectant upon the prior limitation, which has been found to be void for remoteness;

(4) The corpus of the estate will be disposed of as on an intestacy.

Costs of all parties will be out of the estate, those of the executors as between solicitor and client.

Order accordingly.

Solicitors for the trustees, applicants: Lash & Lash, Toronto

[WILSON J.]

Re Adams Estate and Crowe.

Executors and Administrators—Powers—Sale of Land, within Three Years of Death, for Purpose of Distribution—The Devolution of Estates Act, R.S.O. 1937, c. 163, ss. 20(1), (2) (as amended by 1940, c. 28, s. 11), (8), 22.

Reading subss. 1, 2 and 8 of s. 20 of The Devolution of Estates Act together, the result is that an administrator has power, with the concurrence of the persons beneficially entitled, to sell land belonging to the estate for purposes of distribution only, within three years after the death. *Re Cassidy* (1927), 33 O.W.N. 191 at 192, applied; opinion to the contrary in *Re Cavanagh*, [1938] O.W.N. 67 at 68, held to be obiter, and not agreed with.

A MOTION by "the Adams Estate" as vendor, under The Vendors and Purchasers Act, R.S.O. 1937, c. 168, for an order that a requisition on title had been satisfactorily answered. The facts are stated in the reasons for judgment.

20th November 1946. The motion was heard by WILSON J. in Weekly Court at Toronto.

Melville Grant, K.C., for the vendor, applicant.

J. T. Weir, for the purchaser.

5th December 1946. WILSON J.:—This is a motion made on behalf of a vendor for an order that the purchaser's objection to the conveyance by the vendor (to the purchaser) has been satisfactorily answered. The objection is contained in a letter from the purchaser's solicitors to the vendor's solicitors, dated 8th November 1946, as follows: "(2) Required an Order of the Court permitting the sale to Mr. Crowe."

To this the vendor's solicitors replied by letter of 15th November 1946, as follows:

"In answer to your request that we obtain an order of the Court permitting the sale to Crowe in order to free the property from debt, our contention is that under subsection 1 of section 20 of the Devolution of Estates Act, that a conveyance made by the personal representatives and all of the persons beneficially entitled, is sufficient to convey the property.

"Section 22 of the Devolution of Estates Act, provides that a purchaser in good faith and for value, obtains a title free from debts and liabilities of the deceased owner."

The parties appear to agree that an order of the Court would be unnecessary except for the third paragraph on p. 68 of the judgment of Mr. Justice Middleton in *Re Cavanagh*, [1938]

O.W.N. 67. This judgment was given upon a motion by an administrator for an order with reference to a proposed sale of land by the administrator within three years from the date of the intestate's death, but after payment of all debts of the estate of the deceased. The exact relief sought does not appear from the report of the judgment, but the learned judge ruled that the property could only be dealt with by a proper application under The Infants Act, R.S.O. 1937, c. 215, the sole beneficiary being an infant. This was on the ground that the administrator held the lands solely as trustee for the infant by virtue of The Devolution of Estates Act, R.S.O. 1937, c. 163. It is unnecessary to discuss here any part of that decision except the paragraph referred to, which reads:

“ . . . administrators who have discharged their duties as administrators, by paying the debts and liabilities of the deceased, have no right or authority to sell land which they hold as trustees for the persons beneficially entitled by law thereto. The duty of administrators is to allow this land to vest in those beneficially entitled at the expiration of the three years. The land can then only be dealt with as infant's land where infants alone are interested, or under The Partition Act, R.S.O. 1937, ch. 157, where adults are interested. At the expiry of the three years the land has as adequately vested in the persons beneficially entitled as though the administrator had conveyed. Before the three years are up he has no duty to perform beyond that imposed by the statute in question to obtain an order under sec. 20(5) of The Devolution of Estates Act, to distribute among the persons beneficially entitled according to their respective rights and interests. Where infants are interested the precautions and conditions laid down in The Infants' Act must be strictly observed.”

Before discussing this quotation it will be well to state the facts in the present case. One James Adams, the owner of the property in question, died intestate at the city of Toronto on or about 12th May 1946. Letters of administration were granted by the Surrogate Court for the County of York, to Sarah K. Adams, widow, and Ronald Adams, the son of the deceased, on 4th July 1946. In addition to his widow and son, the intestate left him surviving two other children, Elizabeth Prince and Ethel Sudden, both of whom were of age. There were no other children, nor deceased children leaving issue. All of the debts of the intestate

having been paid, the administrators have entered into an agreement to sell property, a house known as 28 Garnet Avenue, Toronto, for purposes of distribution. The widow and children concur in the sale, and they have executed a deed to the purchaser, conveying their interest to him. The purchaser's solicitors contend that the judgment referred to casts doubt upon the interpretation to be placed on subs. 1 of s. 20 of The Devolution of Estates Act, which reads as follows:

"The powers of sale conferred by this Act on a personal representative may be exercised for the purpose not only of paying debts, but also of distributing or dividing the estate among the persons beneficially entitled thereto, whether there are or are not debts, and in no case shall it be necessary that the persons beneficially entitled shall concur in any such sale except where it is made for the purpose of distribution only."

In addition the following other provisions of the same act are relevant. Subs. 2 of the same section, as amended by 1940, c. 28, s. 11, provides:

"Except with the approval of the majority of the persons beneficially entitled thereto representing together not less than one-half of all the interests therein . . . no sale of any such real property made for the purpose of distribution only shall be valid as respects any person beneficially entitled thereto unless he concurs therein; . . . provided . . . that in any case the Supreme Court or a judge thereof may dispense with the concurrence of the persons beneficially entitled or any or either of them."

In this instance all the persons beneficially entitled concur.

By subs. 8 it is declared that the powers of the personal representatives under subs. 2 "have heretofore been and shall hereafter be exercisable during the period of three years from the death of the deceased without an order of the Supreme Court or a judge thereof", but the real property conveyed to, divided or distributed among the persons beneficially entitled thereto shall remain liable for debts as therein provided.

Section 22 provides:

"A person purchasing in good faith and for value real property from the personal representative in manner authorized by this Act shall be entitled to hold the same freed and discharged from any debts or liabilities of the deceased owner, except such as are specifically charged thereon otherwise than by his will, and from all claims of the persons beneficially entitled thereto,

and shall not be bound to see to the application of the purchase money.”

The vendor's and purchaser's counsel agreed in this argument that that part of the judgment referred to above in *Re Cavanagh* was obiter, and they asked in effect for such a declaration upon this motion.

Some difficulty is found perhaps with the interpretation of that part of subs. 8 reading: “The powers of a personal representative under subsection 2 . . . have heretofore been and shall hereafter be exercisable during the period of three years”. A reference to subs. 2 discloses that it does not give to the administrator specific power to sell lands in the circumstances here in question, as will be observed from its relevant provisions set out above.

To give subs. 2 meaning, it must be read with subs. 1 of the same section, and when it is so read, the administrator has power to sell for purposes of distribution. With the greatest respect it must be held that the paragraph in *Re Cavanagh* to which exception is taken is obiter. Indeed it conflicts with the statutory power of sale for distribution within the three-year period expressly given by s. 20(8). If a further reason were needed, reference might be made to a decision of the same learned judge in *Re Cassidy* (1927), 33 O.W.N. 191 at 192, where he recognizes specifically an executor's power to sell, within three years of the testator's death, for the purpose of distribution.

It is hardly necessary to add that s. 22 protects the purchaser.

An order will issue declaring that the requisition has been satisfactorily answered.

Order accordingly.

Solicitors for the purchaser: Mason, Foulds, Davidson & Gale, Toronto.

Solicitors for the vendor: Grant & Grant, Toronto.

INDEX.

APPEALS.

Reversal of Findings of Fact — Trial Judge erroneously Holding that Evidence Lacking on Particular Point.

HUNSINGER V. THE TOWN OF SIMCOE, 203.

BANKRUPTCY.

Persons Exempt from Compulsory Bankruptcy — Wage-earners—Ownership of One Rented House — Special Circumstances—Whether Debtor "carrying on business" — The Bankruptcy Act, R.S.C. 1927, c. 11, ss. 2(II), 7.

RE PSZON, 229.

BANKS AND BANKING.

Joint Account—Effect of Joint Deposit Agreement — Intention of Parties — Transfer of Moneys into Joint Ownership — Survivorship — Resulting Trust.

NILES ET AL. V. LAKE, 102.

CARRIERS.

Liability — Special Limitation in Bill of Lading — "Loss or Damage" exceeding Stated Amount — Theft by Carrier's Employee — The Commercial Vehicles Act, R.S.O. 1937, c. 290.

W. R. JOHNSTON AND COMPANY LIMITED ET AL. V. INTER-CITY FORWARDERS LIMITED ET AL., 754.

CERTIORARI.

When Remedy Available — Acts of Body not a Court — Judicial and

CERTIORARI—Continued

Administrative Functions — Interest of Community — Duty Imposed to Act Judicially — Internal Management of Racing Association — Permissive Powers.

RE NESS AND INCORPORATED CANADIAN RACING ASSOCIATIONS, 387.

CHARITIES.

Charitable Object—Humane Slaughtering of Animals — The Mortmain and Charitable Uses Act, R.S.O. 1937, c. 147, s. 1(2)(d).

RE GEMMILL, 351.

COMPANIES.

Directors—Fiduciary Relationship to Shareholders and Creditors — Breach of Such Duty — Insufficiency of Evidence to Establish — Full Disclosure to Shareholders in Connection with Proposed Transaction.

WESTERN ONTARIO NATURAL GAS COMPANY LIMITED V. AIKENS ET AL., 661.

Directors—Duties and Liabilities —Breach of Fiduciary Relationship towards Shareholders — Setting Aside of Consequent Transactions—Companies with Common Directors.

GRAY V. YELLOWKNIFE GOLD MINES LIMITED AND BEAR EXPLORATION AND RADIUM LIMITED (No. 2), 639.

Directors — Invalidity of Election —Duties of de facto Directors — Powers of Court — The Companies Act, R.S.O. 1937, c. 251, s. 47.

STREIT V. SWANSON ET AL., 565.

Surrender of Charter — Effect of Provincial Secretary's Declaration as to Effective Date—Purported Ex-

COMPANIES—Continued

tension — Voluntary Winding-up Commenced and Order then Sought for Winding-up under Supervision of Court — Insufficiency of Reasons Advanced — The Companies Act, R.S.O. 1937, c. 251, ss. 3, 32, 193—The Interpretation Act, R.S.O. 1937, c. 1, s. 29(g).

RE PORCUPINE GOLD REEF MINING COMPANY LIMITED, 145.

CONFLICT OF LAWS.

Choice of Law — Insurance Policy Issued in British Columbia Statutory Form — Rights with respect to Proceeds of Policy after Adjustment of Loss — All Negotiations Conducted in Ontario — Rights as between Strangers to Insurance Contract.

RE ALLIANCE INSURANCE COMPANY AND THE CANADA TRUST COMPANY, 298.

Domicile — Acquisition of Domicile of Choice — Member of Armed Forces on Active Service—Evidence Required — Factum and Animus.

WILTON V. WILTON, 117.

CONSPIRACY.

To Commit Indictable Offences — Breaches of The Official Secrets Act, 1939 (Dom.), c. 49—Obtaining Information for Communication to Foreign Power — Purposes Prejudicial to Safety or Interests of the State — Sufficiency of Evidence.

REX V. MAZERALL, 762.

Civil Action — Elements of Cause of Action — Action by Company against Former Directors and Majority Shareholders — Insufficiency of Mere Inadequacy of Consideration in Transaction.

WESTERN ONTARIO NATURAL GAS COMPANY LIMITED V. AIKENS ET AL., 661.

CONTRACTS.

Breach of Promise of Marriage — Whether Action Survives against Executors of Deceased Promisor — Corroboration — The Trustee Act, R.S.O. 1937, c. 165, s. 37(2).

SMALLMAN V. MOORE ET AL., 867.

Form — Memorandum in Writing — Repudiation — Sufficiency — The Statute of Frauds, R.S.O. 1937, c. 146, s. 4.

MCLELLAN PROPERTIES LIMITED V. ROBERGE AND ROBERGE, 379.

COSTS.

Payment into Court — Tender before Action — Plaintiff Recovering only Amount Paid in.

W. R. JOHNSTON AND COMPANY LIMITED ET AL. V. INTER-CITY FORWARDERS LIMITED ET AL., 754.

CRIMINAL LAW.

Common Betting Houses — Being "found in" — The Criminal Code, R.S.C. 1927, c. 36, s. 228 (1).

DANLUK V. BIRKNER ET AL., 427.

Dangerous Driving — Sufficiency of Evidence — Influence of Liquor, not Amounting to Intoxication—The Criminal Code, s. 285(6), as enacted by 1938, c. 44, s. 16.

REX V. MAYOSKY, 126.

Dangerous Driving — Speed — Look-out — Special Circumstances — Sentence — The Criminal Code, s. 285(6), as enacted by 1938, c. 44, s. 16.

REX V. BARNES, 175.

Murder and Manslaughter — Culpable Homicide — Unlawful Act — Administration of Sedative — The Criminal Code, ss. 252, 260.

REX V. HILBORN, 552.

Secret Commissions — Construction of Statute — "Corruptly" — The Criminal Code, s. 504(2)(b).

REX V. GROSS, 1.

CRIMINAL LAW—Continued

Defence of Insanity — Charge to Jury — Onus on Accused.

REX V. GIBBONS, 464.

Insanity — Issue as to Accused's Fitness to Stand Trial — Sufficiency of Evidence — Trial Judge's Charge to Jury — Review of Finding on Issue upon Appeal against Conviction — The Criminal Code, ss. 19, 967.

REX V. GIBBONS, 464.

Trials — Position of Crown and Defence Counsel — Impropriety of Comment to Jury on Difference in Positions and Functions of Counsel.

REX V. HILBORN, 552.

Trials — Witnesses — Discretion of Crown Counsel—Witnesses whose Names on Back of Indictment Not Called by Crown at Trial.

REX V. GIBBONS, 464.

Place of Trial — Motion for Change of Venue — Grounds for Allowing — Necessity for Showing that Full and Impartial Trial Not Obtainable — The Criminal Code, s. 884.

REX V. ADAMS, 506.

Punishment — Matters to be Considered in Imposing Sentence — Object of Punishment — Gravity of Offence — General Attitude of Accused — Previous Record.

REX V. WARNER, URQUHART, MARTIN AND MULLEN, 808.

CROWN.

Action against Attorney-General—Declaration Sought as to Rights of Public.

WILLIAMS AND WILSON LIMITED V. THE CITY OF TORONTO AND THE ATTORNEY-GENERAL FOR ONTARIO, 309.

DAMAGES.

Physical Injuries—Loss of Wages —Basis of Computation — Income Tax and Other Deductions at Source.

BOWERS ET AL. V. HOLLINGER & CO. LIMITED ET AL., 526.

DEFAMATION.

Qualified Privilege — Malice — Charge to Jury — Amount of Damages — The Libel and Slander Act, R.S.O. 1937, c. 113, s. 4.

DENNISON ET AL. V. SANDERSON ET AL., 601.

DISCOVERY.

Persons Examinable — Action by Trustee of Bankrupt Company — Attempted Examination of President of Company — Rules 327, 334, 335 — The Interpretation Act, R.S.O. 1937, c. 1, s. 32 (ze).

GUARANTY TRUST COMPANY OF CANADA V. FLEMING & TALBOT, 817.

DIVORCE AND MATRIMONIAL CAUSES.

Alimony — Grounds — Legal Cruelty — Neglect and Unfaithfulness of Husband, Persisted in after Knowledge that Wife's Health being Undermined by Worry.

MCINROY V. MCINROY, 587.

Collusion — Agreement by Husband as to Monthly Payment of Maintenance and Continuing of Insurance Policies.

SCOTT V. SCOTT AND PFEIL, 832.

Evidence — Sufficiency—Evidence of Non-access — The Evidence Act, R.S.O. 1937, c. 119, s. 5a, as enacted by 1946 (Ont.), c. 25, s. 1.

CRONE V. CRONE AND KAY, 573.

DIVORCE AND MATRIMONIAL CAUSES—Continued

Jurisdiction of Courts — Domicile — Provincial, as Opposed to Canadian Domicile.

WILTON V. WILTON, 117.

DRAINAGE.

Municipal Drainage Work — Carrying Water into Different Municipality — When "required" — Right of Appeal to Drainage Referee and Court of Appeal — The Municipal Drainage Act, R.S.O. 1937, c. 278, ss. 63, 67, 68.

THE TOWNSHIP OF HARWICH V. THE TOWNSHIP OF HOWARD, 268.

EVIDENCE.

Admissibility of Evidence Given on Oath before Royal Commission — Inapplicability of Rules respecting Confessions to Police or Persons in Authority — Criminating Answers — Failure to Object — The Canada Evidence Act, R.S.C. 1927, c. 59, s. 5 — Proof of Appointment of Commission.

REX V. MAZERALL, 511, 762.

Confessions — Warning by Police — Form—The Criminal Code, R.S.C. 1927, c. 36, s. 684.

REX V. GIBBONS, 464.

Confessions and Admissions by Accused Persons — Evidentiary Value — Proper Charge to Jury — Whether Voluntary.

REX V. HARRIS, 407.

Corroboration — Claims against Executors of Deceased Person — Breach of Promise of Marriage — What Must be Corroborated — The Evidence Act, R.S.O. 1937, c. 119, ss. 10, 11.

SMALLMAN V. MOORE ET AL., 867.

Presumptions — Validity of Marriage — Death.

RE BELL, 854.

EVIDENCE—Continued

Real Property — Registered Memorials of Old Instruments — Conditions, of Admissibility — The Vendors and Purchasers Act, R.S.O. 1937, c. 168, ss. 1(c), 2 — The Evidence Act, R.S.O. 1937, c. 119, s. 54.

WILLIAMS AND WILSON LIMITED V. THE CITY OF TORONTO AND THE ATTORNEY-GENERAL FOR ONTARIO, 309.

EXECUTORS AND ADMINISTRATORS.

Duties — Trust Funds Provided for by Will — Payment of Interest before Funds Set up — Rate of Interest payable.

RE NATHANSON, 421.

Duty to Act personally — Power of Sale — Delegation to Attorney — Purported Ratification by Executor — Note or Memorandum in Writing.

MCLELLAN PROPERTIES LIMITED V. ROBERGE AND ROBERGE, 379.

Powers — Sale of Land, within Three Years of Death, for Purpose of Distribution — The Devolution of Estates Act, R.S.O. 1937, c. 163, ss. 20(1), (2), (as amended by 1940, c. 28, s. 11), (8), 22.

RE ADAMS ESTATE AND CROWE, 890.

Actions against — What Causes of Action Survive — Breach by Deceased of Promise of Marriage — The Trustee Act, R.S.O. 1937, c. 165, s. 37(2).

SMALLMAN V. MOORE ET AL., 867.

FRAUDULENT CONVEYANCES

Setting Aside — Valuable and Adequate Consideration — Necessity for Proving Actual Intent to Defraud by both Vendor and Purchaser — The Fraudulent Conveyances Act, R.S.O. 1937, c. 149.

FERGUSON V. LASTEWKA ET AL., 577.

GIFTS.

Donatio Mortis Causa — Sufficiency of Delivery—Key to Safety-Deposit Box — Pass-Book for Account in Provincial Savings Office—The Agricultural Development Finance Act, R.S.O. 1937, c. 77.

BROWN V. ROTENBERG ET AL., 363.

HIGHWAYS.

Constitution — Dedication and Acceptance — Burden of Proof — Action by Owner of Paper Title for Declaration that No Rights of Passage Exist — Attorney-General as Party Defendant to Action — The Municipal Act, R.S.O. 1937, c. 266, s. 454.

WILLIAMS AND WILSON LIMITED V. THE CITY OF TORONTO AND THE ATTORNEY-GENERAL FOR ONTARIO, 309.

Constitution — Dedication and Acceptance — Sufficiency of Evidence — Nature of Public User.

HUNSINGER V. THE TOWN OF SIMCOE, 203.

HUSBAND AND WIFE.

Causes of Action against Third Persons — Whether Wife Entitled to Sue for Damages for Enticement and Loss of Consortium — History of Legislation — The Married Women's Property Act, R.S.O. 1937, c. 209, s. 3(1).

APFLEBAUM V. GILCHRIST, 695.

Criminal Conversation and Alienation of Affections — Whether Cause of Action for Crim. Con. Exists in Ontario — Measure of Damages — Matters to be Considered in Assessment.

MOWDER V. ROY, 154.

INFANTS.

Contracts — Whether Voidable or Void — Penalties — Conditional Sale Agreement.

MCBRIDE V. APPLETON, 17.

INJUNCTIONS.

Mandatory Interlocutory Injunction — Action for Possession of Land — Vendor Remaining in Possession.

SUTTON AND SUTTON V. VANDERBURG, 497.

INSURANCE.

Fire — Policy Protecting against Several Forms of Loss including Loss by Fire — Applicability to Loss by Fire of Part IV of The Insurance Act, R.S.O. 1937, c. 256—Notice and Proofs of Loss — Variation of Statutory Conditions — Ss. 1(23), (39), 101, 106, 109, stat. con. 15.

REGAL FILMS CORPORATION (1941) LIMITED V. GLENS FALLS INSURANCE COMPANY, 341.

Mortgage — Covenant in Deed of Trust and Mortgage to Insure for Benefit of Trustee — Effect as Equitable Assignment of Insurance — Priority over Liens arising after Execution.

RE ALLIANCE INSURANCE COMPANY AND THE CANADA TRUST COMPANY, 298.

INTOXICATING LIQUORS

Appeals — Limitations on Powers of Judge — Materials to be Considered — The Liquor Control Act, R.S.O. 1937, c. 294, s. 156.

REX V. ASHALL, 397.

Seizure and Confiscation of Automobile wherein Liquor Unlawfully Kept — Nature of Proceedings — Notice — The Liquor Control Act, ss. 130, 131.

REX V. ASHALL, 397.

JUDGMENTS AND ORDERS

Final and Interlocutory—Appeals with or without Leave — Dismissal of Motion to Vary Award of Maintenance — Appointment of Receiver — The Judicature Act, R.S.O. 1937, c. 100, ss. 16, 24 — Rule 493.

MCCART V. MCCART AND ADAMS, 729.

Final and Interlocutory — Leave to Appeal — Order Permitting Examination for Discovery of Person not Party to Action — The Judicature Act, s. 24.

GUARANTY TRUST COMPANY OF CANADA V. FLEMING & TALBOT, 817.

LANDLORD AND TENANT.

Constitution of Relationship — Reservation by Lessor of Right to Occupy Part of Premises — War-time Controls.

PAPADAKIS V. HARAKAS, 67.

Covenant Not to Assign or Sublet without Leave — Assignment, expressly Made Conditional upon Landlord's Consent — Conduct of Parties—The Short Forms of Leases Act, R.S.O. 1937, c. 159, schedule B, clause 8.

LAJEFFRIES V. ROBERTS, 10.

LUNATICS.

Liability for Negligence — Nature and Extent of Delusions — Capacity to Understand Duty to Take Care and Ability to Perform it.

BUCKLEY AND THE TORONTO TRANSPORTATION COMMISSION V. SMITH TRANSPORT LIMITED, 798.

MASTER AND SERVANT.

Whether Relationship Exists — Tenant Assisting Landlord's Agent in Construction Work on Rented

MASTER AND SERVANT

—Continued

Premises — The Workmen's Compensation Act, R.S.O. 1937, c. 204.

KENT V. BELL AND BELL, 743.

MILITARY LAW.

Punishment of Offenders — Jurisdiction of Court-martial—Investigation by Commanding Officer — Delay — The Army Act, 1881 (Imp.), c. 58 — Rules of Procedure — The Militia Act, R.S.C. 1927, c. 132, s. 69(1).

RE THOMPSON, 77.

MORTGAGES.

Actions — Limitation — Conveyance of Equity of Redemption—The Limitations Act, R.S.O. 1937, c. 118, s. 48(1)(k), as re-enacted by 1939, c. 25, s. 1(1) — The Mortgages Act, R.S.O. 1937, c. 155, s. 17a, as enacted by 1939, c. 28, s. 1.

RODD ET AL. V. WESTERN ET AL., 619.

Insurance — Covenant in Deed of Trust and Mortgage to Insure for Benefit of Trustee — Effect as Equitable Assignment of Insurance — Priority over Liens arising after Execution.

RE ALLIANCE INSURANCE COMPANY AND THE CANADA TRUST COMPANY, 298.

MOTOR VEHICLES.

Evidence — Compulsory Reports and Statements to Police Officers — Extent of Privilege against Subsequent Use as Evidence — The Highway Traffic Act, R.S.O. 1937, c. 288, s. 94, as amended by 1938, c. 17, s. 20.

REX V. GORDON, 845.

MUNICIPAL CORPORATIONS.

Gifts of Land to Municipalities for Particular Purposes — Sufficiency of Evidence of Dedication and Acceptance — "Common" — The Surveys Act, R.S.O. 1937, c. 232, s. 12(2).

THE TOWNSHIP OF CORNWALL V. MCNAIRN ET AL., 837.

Building Restrictions — Effect — Declaring Street to be "Residential" — Whether Construction of Hospital Prevented — The Municipal Acts, R.S.O. 1914, c. 192, s. 406 (10); R.S.O. 1937, c. 266, ss. 406, 414 (9) — The Municipal Amendment Act, 1941 (Ont.), c. 35, s. 13 — History of Legislation.

RE THE RELIGIOUS HOSPITALLERS OF ST. JOSEPH AND THE CITY OF ST. CATHARINES, 544.

Zoning By-laws — Effect — Land Used before Passing of By-law for Purposes Contrary thereto — Erection of New Buildings — The Municipal Act, R.S.O. 1937, c. 266, s. 406, as amended by 1941, c. 35, s. 13 and 1943, c. 16, s. 11.

RE WILMOT ET AL., AND THE CITY OF KINGSTON, 437.

Liability for Ice and Snow—Gross Negligence — The Municipal Act,— R.S.O. 1937, c. 266, s. 480(3).

BERTHIAUME ET AL. V. THE CITY OF OTTAWA, 788.

NARCOTIC DRUGS.

Possession — Sufficiency of Evidence — Occupation of Premises — The Opium and Narcotic Drug Act, 1929 (Dom.), c. 49, ss. 4(1) (d), 17 (as amended) — The Criminal Code, R.S.C. 1927, c. 36, s. 5(2).

REX V. LOU HAY HUNG, 187.

NEGLIGENCE.

Liability — Mental Disease — Capacity to Appreciate and Perform Duty to Take Care.

BUCKLEY AND THE TORONTO TRANSPORTATION COMMISSION V. SMITH TRANSPORT LIMITED, 798.

Dangerous Premises — Moving Picture Theatre — Basement Stairway — Sufficiency of Protection.

BROWN ET AL. V. B. AND F. THEATRES LIMITED, 454.

Dangerous Premises — Duty to Invitee — Necessity that Invitee Take Reasonable Care for Own Safety.

PFISTER V. TORONTO TRANSPORTATION COMMISSION, 328.

Dangerous Premises — Basis of Liability to Invitee — Sufficiency of Evidence.

KENT V. BELL AND BELL, 743.

Dangerous Premises—Liability to Licensees — Occupier's Knowledge of Dangerous Condition — Collapse of Flagpole in Park, Caused by Boys Climbing.

BOOTH ET AL. V. THE CITY OF ST. CATHARINES ET AL., 628.

Duty of Occupier of Dangerous Premises — Person on Premises for Unlawful Purposes — Common Betting House — The Criminal Code, R.S.C. 1927, c. 36, s. 228 (1).

DANLUK V. BIRKNER ET AL., 427.

Construction of Jury's Findings — Both Parties Found Negligent — Plaintiff's Negligence subsequent — Dismissal of Action on Appeal.

BROWN ET AL. V. B. AND F. THEATRES LIMITED, 454.

PROHIBITION.

Right of Appeal — Prohibition Arising in Criminal Matter — Proceedings under The Army Act, 1881 (Imp.), c. 58, leading to Punishment of Soldier.

RE REX V. THOMPSON, 560.

REAL PROPERTY.

Registration — Notice of Trust affecting Land — Insufficiency of Constructive Notice — Description of Grantee as "Trustee" — Trust Instrument Not Registered — Whether Subsequent Purchaser Affected — The Registry Act, R.S.O. 1937, c. 170, ss. 74, 75.

RE SEPERICH AND MADILL, 864.

SALE OF LAND.

Option to Purchase — Option Contained in Lease — Tenant Remaining in Possession after Expiration of Term — Whether Option Continued — Rule against Perpetuities.

RE DEVINE AND FERGUSON, 736.

SECURITIES.

Registration — Functions and Duties of Ontario Securities Commission — Review of Registrations under Former Acts — Appeals — The Securities Act, 1945 (Ont.), c. 22, ss. 10, 47, 82 (as amended by 1946, c. 86, s. 10).

RE THE SECURITIES ACT AND MORTON, 492.

STREET RAILWAYS

Negligence — Failure to Sound Warning — Whether Contributory Cause of Accident — Contributory Negligence — Meaning of Jury's Findings.

MARKS V. HAMILTON STREET RAILWAY COMPANY ET AL., 236.

STREET RAILWAYS—Continued

Negligence — Shelter Built for Accommodation of Street-car and Bus Passengers — Overhang of Street-cars when Travelling Around Loop — Warnings — Findings of Jury — Negligence of Plaintiff — The Negligence Act, R.S.O. 1937, c. 115.

PFISTER V. TORONTO TRANSPORTATION COMMISSION, 328.

SUCCESSION DUTIES

"Property passing on death" — Duty Payable out of General Estate — Whether Amount of Such Duty Dutiable as Part of Residue — The Succession Duty Act, 1939, 2nd sess. (Ont.), c. 1, ss. 5, 19(1).

RE FLAVELLE ESTATE; NATIONAL TRUST COMPANY, LIMITED ET AL. V. THE TREASURER OF ONTARIO, 377.

TAXATION.

Dominion Income Tax — Lien for Taxes — Moneys "otherwise payable to taxpayers" — The Income War Tax Act, R.S.C. 1927, c. 97, s. 72.

RE ALLIANCE INSURANCE COMPANY AND THE CANADA TRUST COMPANY, 298.

Municipal Income Assessment — Income of Company Not Derived from Business in Respect of which Business Assessment Made — Formation of Company for Special Undertaking — The Assessment Act, R.S.O. 1937, c. 272, ss. 8, 9(1) (b).

TOMLINSON CONSTRUCTION COMPANY LIMITED V. THE CITY OF TORONTO, 40.

Municipal Real Property Assessment — Exemptions — Property Rented to University — Independent Club Permitted to Use Part — Whether "actually used and occupied" by University — The Assess-

TAXATION—Continued

ment Act, s. 4(3), (10) — *The University Act*, R.S.O. 1937, c. 372, s. 15(1).

THE CITY OF TORONTO V. THE GOVERNORS OF THE UNIVERSITY OF TORONTO ET AL., 215.

TRIALS.

Jury Trial — *View of Locus* — *Proper Directions to Jury* — *Presence of Judge and Counsel* — *The Jurors Act*, R.S.O. 1937, c. 108, s. 87 — *Rule 266*.

PFISTER V. TORONTO TRANSPORTATION COMMISSION, 328.

TRUSTS.

Validity — *Severability* — *Capacity of Trustee* — *Promotion of Humane Slaughtering of Animals* — *Municipality as Trustee* — *The Municipal Act*, R.S.O. 1937, c. 266, s. 267 — *The Public Health Act*, R.S.O. 1937, c. 299, s. 112.

RE GEMMILL, 351.

Resulting Trust — *Property Bought with Funds Contributed by Several Persons, but Title Taken in Names of Two only* — *Sufficiency of Evidence* — *Presumptions*.

WOOD V. STRANGE ET AL., 139.

WAR MEASURES.

Compulsory Military Training — *Exemptions* — *"Minister of a Religious Denomination"* — *Jehovah's Witnesses* — *The National Selective Service Mobilization Regulations*, 1944, s. 3(2) (c).

GREENLEES V. ATTORNEY-GENERAL FOR CANADA, 90.

WILLS.

Construction — *Gift, apparently Absolute, Followed by Gift Over*.

RE PLANT, 521.

Certainty — *Perpetuity* — *Charitable Bequest Contingent upon Gift Void for Uncertainty*.

RE METCALFE, 882.

Conditions — *Uncertainty and Repugnancy* — *Beneficiary to "Rejoin" Church and "Practise" Faith*.

RE STARR, 252.

Life Estate with Power of Appointment, and Remainder, in Default of Appointment, to Heirs of Life Tenant — *Application of Rule in Shelley's Case to Personalty* — *Provisions excluding Application of Rule* — *Restraint on Alienation during Coverture*.

RE WOODS, 290.

Dependants' Relief — *Separation Agreement with Payment of Lump Sum by Husband* — *Whether Wife Entitled to Claim Allowance out of Estate* — *The Dependants' Relief Act*, R.S.O. 1937, c. 214, ss. 7, 9.

OLIN V. PERRIN ET AL., 54.

WORKMEN'S COMPENSATION.

Effect of Statute on Common Law Right of Action — *Employee's Action against Negligent Third Party, itself an Employer* — *Whether Accident Arose "out of" and "in course of" Employment* — *Voluntary Payment of Compensation* — *The Workmen's Compensation Act*, R.S.O. 1937, c. 204, s. 2; s. 8(6), as re-enacted by 1945, c. 28, s. 1 — *The Government Employees Compensation Act*, R.S.C. 1927, c. 30, as amended by 1931, c. 9.

BOWERS ET AL. V. J. HOLLINGER & CO. LIMITED, ET AL., 526.

